TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 97.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs

HENRY S. MARLOR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1884.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between Henry S. Marlor, plaintiff, and The Texas and Pacific Railway Company, defendant, a manifest error hath happened, to the great damage of the said Texas and Pacific Railway Company, as is said and as appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the fourth Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-fifth day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed:
WM. J. WALLACE.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to one hundred and thirty, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The Texas and Pacific Railway Company, plaintiff in error, against Henry S. Marlor, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district

of New York, in the second circuit, this 11th day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

Due and timely service of the within writ of error is hereby admitted.

Dated New York, Sept. 25, 1884.

DOS PASSOS BROS.,
Att'ys for Def't in Error.

3 *Summons.*

Supreme Court, New York County.

HENRY S. MARLOR, Plaintiff,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

Trial desired to be had in the county of New York.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, November 16th, 1883.

DAS PASSOS BROS.,
Plaintiff's Attorneys, Office No. 29 Wall Street, New York City.

4 Supreme Court, New York County.

HENRY S. MARLOR, Plaintiff,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

Trial to be had in the county of New York.

The plaintiff, by Dos Passos Bros., his attorneys, for complaint against the defendant, alleges, upon information and belief, as follows:

First. That the defendant, The Texas and Pacific Railway Company, is, and at the several times hereinafter mentioned was, a foreign corporation duly incorporated under and by virtue of the acts of Congress of the United States of America.

Second. That on or about the 29th day of March, 1875, the stockholders of said defendant company, under and by virtue of its corporate powers and privileges, duly convened in corporate meeting and authorized and empowered the board of directors of the said

defendant to provide for and to issue eighty-nine hundred and eight (8,908) bonds called income and land-grant bonds, each for the sum of $1,000, bearing seven per cent. interest, the interest
5 and the principal of said bonds to be payable in United States currency, and said bonds to mature in forty years from their date.

Third. That thereupon and in pursuance of said resolution of the stockholders of said defendant referred to in the second paragraph of this complaint, and in pursuance of the authority conferred by its charter, and of the several acts of the Congress of the United States of America under which said defendant was incorporated, the said defendant, on or about the 15th day of May, 1875, caused to be made, executed, and issued eight thousand nine hundred and eight income and land-grant bonds, each for the sum of $1,000, bearing interest at the rate of seven per cent. per annum, which said bonds were duly signed by the president and secretary of said defendant company, and were duly sealed with its seal, and that each of said bonds is in the words and figures as follows (the number being left blank):

THE UNITED STATES OF AMERICA.

No. —. $1,000.

The Texas and Pacific Railway Company.

Chartered by act of Congress.

Seven per cent. Income and Land-Grant Bond on Eastern Division.

The Texas and Pacific Railway Company hereby acknowledges itself to be indebted to —— ——, of ——, or assigns, in the
6 sum of one thousand dollars, lawful money of the United States of America, which sum the said company promises to pay to the said —— ——, or assigns, at the office of the company in the city of New York, on the first day of January, A. D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent. per annum, payable annually on the first day of July in each year, as provided in the mortgage hereinafter mentioned.

This bond is one of a series of bonds numbered, consecutively, from one to eight thousand nine hundred and eight, of the denomination of one thousand dollars each, of like tenor and date, the payment whereof is secured by a first mortgage, of even date herewith, duly recorded, upon certain lands heretofore granted to the Texas and Pacific Railway Company by the State of Texas, or in which said company is in any manner interested, being a first lien or charge upon all those sections or fractional sections or square miles of land acquired or to be acquired by said company in constructing its lines of road east of Fort Worth, under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railroad Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and enactments relating thereto, or under any of the special or general laws

passed by the Legislature of the State of Texas and applicable to said companies, or either of them, or to the Texas and Pacific
7 Railway Company, the total quantity of land to be acquired in constructing said lines of railway under the several grants being estimated at or about 7,600,000 acres. This bond has also a security for the interest, a mortgage lien upon the net income of the said The Texas and Pacific Railway Company derived from operating its lines of railway east of Fort Worth, in the State of Texas, after providing for the operating expenses, the current repairs and reconstructions, and the interest upon the first and second mortgage bonds secured upon said lines of railway, the length of which, constructed and to be constructed, is estimated to be 524 miles, and in case such net earnings shall not in any one year be sufficient to enable the company to pay 7 per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest, such scrip to be received at par, and interest the same as money, in payment for any of the company's lands acquired as aforesaid in Texas, at the ordinary schedule price, or it may be converted into capital stock of the company when presented in amounts of $100 or its multiple. The holder of this bond is entitled to the benefit of the additional security of the sinking fund provided for in said mortgage, consisting of the net proceeds of the sales of the lands aforesaid, which are to be applied from time to time to the purchase of said bonds at their market value, not exceeding par, or to their redemption, as provided in the mortgage aforesaid.
8 This bond also will be received by the company at par and accrued interest in payment or exchange for any of its lands covered by the mortgage aforesaid at the current cash price of the same as fixed from time to time.

In witness whereof the said The Texas and Pacific Railway Company has caused these presents to be duly executed, sealed with its corporate seal, and attested by *its* proper signature of its president or vice-president and secretary this 15th day of May, A. D. 1875.

FRANK S. BOND,
Vice-President.

Attest: C. E. SATTERLEE, *Secretary.*

Certificate of Trustees.

This bond is one of a series of bonds, each for the sum of one thousand dollars, lawful money of the United States of America, bearing seven per cent. interest per annum, payable yearly, said bonds being numbered, consecutively, from number one to number eight thousand nine hundred and eight. The said bonds are secured by a first mortgage upon all the lands of the Texas and Pacific Railway Company in the State of Texas granted in aid of the construction of its lines east of Fort Worth, and also upon the net income of said lines of railway after deducting current expenses, reconstructions and repairs, and the interest upon the first and second mortgage on said lines of railway, and they are also receivable the same

as money in payment or exchange for such lands at the
9 current price of the same as fixed from to time to time.

W. T. WALTERS AND
GEORGE D. KRUMBHAAR, *Trustees.*

Fourth. That prior to the first day of July, 1883, the plaintiff herein purchased, on the stock exchange, in the city of New York, and then and there became and now is the lawful owner and holder of, one hundred and fifty of the aforesaid land-grant and income bonds made and issued by the said defendant and described in the third paragraph of this complaint.

Fifth. That the defendant failed and neglected to exercise the option given to said defendant in and by the terms of said bonds to pay the plaintiff the interest in scrip upon said one hundred and fifty land-grant and income bonds due and payable, by the terms thereof, on the 1st day of July, 1882; that said defendant likewise failed and neglected to exercise the option given to the defendant in said bonds to pay the plaintiff interest in scrip, which, by the terms of said bonds, became due and payable upon said one hundred and fifty bonds on the 1st day of July, 1883, and that, by reason of the failure and neglect of said defendant to exercise said option, there is now due and owing to plaintiff upon said 150 bonds interest, at the rate of seven per cent. per annum, due the 1st day of July,
10 1882, amounting to the sum of $10,500, and interest, at the rate of seven per cent. per annum, due on the 1st day of July, 1883, amounting to the sum of $10,500.

Sixth. That the plaintiff has duly demanded the payment of the said interest due as aforesaid on the first days of July in the years 1882 and 1883, but the defendant has refused and neglected and still does refuse and neglect to pay the same, and that by reason thereof the said defendant became, was, and is indebted to the plaintiff for said interest in the aggregate sum of $21,000, with interest upon said several amounts, respectively, and that no part thereof has ever been paid by defendant.

Wherefore plaintiff demands judgment against said defendant for the sum of $21,000, with interest on the sum of $10,500 from the 1st day of July, 1882, and interest upon the sum of $10,500 from the 1st day of July, 1883, together with the costs and disbursements of this action.

Dated N. Y., November 16th, 1883.

DOS PASSOS BROS.,
Attorneys for Plaintiff, Office and P. O.
Address No. 29 Wall St., N. Y.

CITY AND COUNTY OF NEW YORK, ss.:

Henry S. Marlor, being duly sworn, deposes and says that he is the plaintiff in this action; that the foregoing complaint is
11 true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters that he believes it to be true.

HENRY S. MARLOR.

Sworn to before me this 16th day of November, 1883.

D. M. HILDRETH,
Notary Public, Kings Co., N. Y.

Certificate filed N. Y. Co.

(Endorsed:) N. Y. supreme court. Henry S. Marlor, plaintiff, against the Texas and Pacific Railway Company, defendants. Office copy. Summons and complaint. Dos Passos Bros., plaintiff's attorneys, No. 29 Wall St., N. Y.

12 *Notice of Appearance.*

N. Y. Supreme Court, City and County of New York.

HENRY S. MARLOR, Plaintiff,
against
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

SIR: Please to take notice that the defendant appears in this action, and that we are retained as attorneys for said defendant therein and demand that all papers in this action be served on us at our office, number 195 Broadway, New York city, December 6th 1883.

Yours, &c.,

DILLON AND SWAYNE,
Attorneys for Defendant.

Office No. and post-office address, 195 Broadway, New York city.

To Dos Passos Bros., plaintiff's attorneys, No. 29 Wall St., N. Y. city.

(Endorsed:) N. Y. supreme court. Henry S. Marlor ag'st the Texas and Pacific Railway Company. Notice of appearance of defendant. Dillon & Swayne, attorneys for defendant. Service of a notice, of which the within is a copy, admitted this — day of ——, 18–. To Mess. Dos Passos Bros., plaintiff's attorneys, 29 Wall St., N. Y. city. Rec'd Dec. 6th, 1883.

13 New York Supreme Court, City and County of New York.

HENRY S. MARLOR, Plaintiff,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

The defendant demurs to the complaint herein for the ground that it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action.

Dated December 6, 1883.

DILLON & SWAYNE,
Defendant's Attorneys.

(Endorsed:) New York supreme court. Henry S. Marlor, plaintiff, against The Texas and Pacific Railway Company, defendant. Copy. Demurrer. Dillon & Swayne, 195 Broadway, New York, attorneys for def'ts. To Mess. Dos Passos Bros., attorneys for plaintiff. Rec'd Dec. 6, 1883.

14 New York Supreme Court.

HENRY S. MARLOR, Plaintiff,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

The defendant having applied to me, pursuant to section 1778 of the code of civil procedure, for an order directing that the issues in this section be tried, now, on reading the complaint and the demurrer thereto of the defendant, I do hereby order, pursuant to said section of the code, that the issues presented by the pleadings in this action, namely, the plaintiff's complaint and the defendant's demurrer thereto, be tried.

Dated New York, December 7th, 1883.

(Signed) A. R. L., *J. S. C.*

(Endorsed:) New York supreme court. Henry S. Marlor, plaintiff, against The Texas and Pacific Railway Company, defendant. Copy. Order directing trial of issues and notice. Dillon & Swayne, 195 Broadway, New York, attorneys for defendant. To Mess. Dos Passos Bros., attorneys for plaintiff.

15 N. Y. Supreme Court.

HENRY S. MARLOR

against

THE TEXAS AND PACIFIC RAILWAY COMPANY.

GENTLEMEN: Take notice that the papers hereto annexed are copies of the petition and bond as now filed in the supreme court for the city and county of New York December 7th, 1883, whereby this cause is removed to the United States circuit court for the southern district of New York.

Yours, &c., DILLON & SWAYNE,
Def't's Att'ys.

Dated N. Y., Dec. 7th, 1883.

To Mess. Dos Passos Bros., pl'ff's att'ys.

16 New York Supreme Court, City and County of New York.

HENRY S. MARLOR

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

To the honorable the supreme court of the State of New York:

Your petitioner, The Texas and Pacific Railway Company, the defendant herein, presents this its petition for the removal of this suit to the circuit court of the United States for the southern district of New York, and respectfully shows to this honorable court as follows:

1. This suit was begun in this court by the service of the summons and complaint upon your petitioner on or about November

17th, 1883, and your petitioner duly appeared herein by Messrs. Dillon and Swayne, its attorneys, on December 6th, 1883; that the plaintiff was, at the time of the commencement of this suit and still is, a citizen of the State of New York.

2. That your petitioner, at the time of the commencement
17 of this suit, was and still is a corporation duly formed, organized and existing under and by virtue of an act of Congress of the United States, approved March 3rd, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," and the various acts of Congress amendatory and supplemental thereof, having its railroad, which it operates, as well — its principal place of business, domicile, and its headquarters, in the State of Texas, where it is located, and it is for jurisdictional purposes a citizen of the State of Texas, and at the time of the commencement of this suit was and now is a citizen of the State of Texas.

3. That your petitioner was, at the time of the commencement of this suit, and now is, a corporation other than a banking corporation, organized under a law of the United States, to wit, the act of Congress of the United States, approved July 1st, 1862, above referred to, and the various acts of Congress amendatory and supplemental thereto; that this suit is a suit commenced in this court, being a court other than a circuit or district court of the United States, against your petitioner as such corporation, and is for an alleged liability of your petitioner as such corporation, and that your petitioner has a defense in this suit and to the cause of action of the plaintiff herein and as against said plaintiff arising under or by virtue of a law of the United States, to wit, said acts of Congress hereinbefore referred to, and that said defense involves the
18 true and correct construction of the said law of the United States, to wit, said act of Congress before referred to, and the various acts amendatory and supplemental thereof, and of the rights, titles, and obligations of your petitioner under and by virtue thereof, and that the amount in controversy herein, exclusive of costs, exceeds the sum or value of five hundred dollars.

4. Your petitioner further shows that this is a suit of a civil nature now pending in this court, and that the matter in dispute exceeds, as aforesaid, exclusive of costs, the sum or value of five hundred dollars, arising under the laws of the United States, and in which there is a controversy which is wholly between citizens of different States, which can be fully determined as between them.

5. Your petitioner now, at the time of filing this its petition, and in this court, offers good and sufficient security for its entering in the circuit court of the United States for the southern district of New York, on the first day of its now next session, copies of all processes against it, and of all pleadings, depositions, testimony, and other proceedings in this cause, and also for its there appearing and entering special bail in the cause or suit, if special bail was originally requisite therein; and your petitioner makes and files herewith a bond, with good and sufficient surety for its entering in said circuit court, on the first day of the now next session, a copy of the

record in this suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that this suit
19 was wrongfully or improperly removed thereto, and also for its there appearing and entering special bail in this suit if special — was originally required therein.

Wherefore your petitioner prays this honorable court to accept this its petition and the said surety or bond, and to proceed no further in this suit.

Dated New York, Dec'r 6th, 1883.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By JAY GOULD, *President.*

DILLON & SWAYNE,
Attorneys for the Texas & Pacific Railway Company, Petitioner and Defendant.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

Jay Gould, being duly sworn, says that he is the president of the above-named petitioner and defendant; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

JAY GOULD.

Sworn to before me this 6th day of December, 1883.

WM. J. HARDING,
Notary Public.

20 Know all men by these presents that we, the Texas and Pacific Railway Company, as principal, and Jay Gould and Russell Sage, as sureties, are hereby held and firmly bound unto Henry S. Marlor, his heirs, representatives, and assigns, in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, — heirs, representatives, successors, and assigns, firmly by these presents:

The condition of this obligation is such that if the Texas & Pacific Railway Company shall enter and file or cause to be entered and filed in the circuit court of the United States for the southern district of New York, on the first day of its next session, copies of all process against it, and of all pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the supreme court of the State of New York, wherein Henry S. Marlor is plaintiff and The Texas and Pacific Railway Company is defendant, and shall in said circuit court then appear and enter special bail in said cause or suit if special bail was originally requisite therein, and shall do such other proper acts as by the act of Congress in that behalf are required to be done upon the removal of said suit or cause from the said State court; and upon the further condition, namely, if the said The Texas and Pacific Railway Company shall enter in

the said circuit court of the United States, on the first day of its now next session, a copy of the record in said suit, and shall well
21 and truly pay all the costs that may be awarded by the said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, and shall also then and there appear and enter special bail in the said suit, then this obligation to be void; otherwise to remain in full force and effect.

In witness whereof the said Texas and Pacific Railway Company has caused these presents to be executed in its name and on its behalf by its president and secretary, and its common seal to be affixed, and the said Jay Gould and Russell Sage have hereunto set their hands and seals this 6th day of December, 1883.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By JAY GOULD, *President.*
JAY GOULD. [SEAL.]
RUSSELL SAGE. [SEAL.]

Attest:
[SEAL.] C. E. SATTERLEE, *Secretary.*

STATE OF NEW YORK, *City and County of New York,* } ss:

Russell Sage, one of the subscribers to the foregoing instrument, being duly sworn, says that he is a resident and a freeholder within this State and is worth the sum of five hundred dollars over all debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

RUSSELL SAGE.

Sworn to before me this 6th day of December, 1883.
22 [SEAL.] GEO. V. TURNER,
Notary Public, N. Y. Co., No. 77.

STATE OF NEW YORK, *City and County of New York,* } ss:

This is to certify that on this 6th day of December, 1883, before me personally appeared Jay Gould, to me personally known to be the president of the Texas and Pacific Railway Company and who executed the foregoing instrument as such president of said company, and acknowledged to me that he so executed the same as president of said company; and this is to further certify that on the same day personally appeared before me Jay Gould and Russell Sage, to me personally known, and known to me to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged that they executed the same.

[SEAL.] GEO. V. TURNER,
Notary Public.

(Endorsed:) N. Y. supreme court. Henry S. Marlor, plaintiff, against The Texas and Pacific Co., defendant. Copy. Petition and bond for removal and notice. Dillon & Swayne, 195 Broadway,

New York, attorneys for def't. Rec'd Dec. 7, 1883. To Mess. Dos Passos Bros., attorneys for pl'ff. I approve of the within bond. Abrh. R. Lawrence, J. S. C.

23 At a special term of the supreme court of the State of New York held in the county court-house, in the city of New York, on the 7th day of December, 1883.

Present: Hon. Abraham R. Lawrence, justice.

HENRY S. MARLOR, Plaintiff,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

Upon reading and filing of the petition of the above-named The Texas and Pacific Railway Company, defendant herein, for the removal of this suit into the circuit court of the United States for the southern district of New York, in pursuance of the laws of the United States relating to the removal of suits from the State courts, and upon filing the security offered by said defendant according to the requirements of said laws, and on motion of John F. Dillon, attorney for the said defendant:

It is hereby ordered that the said security be accepted and the said suit be removed into the next circuit court of the United States to be held in the said southern district of New York, and that no

24 further proceedings be had in said suit in this court.

[SEAL.] —— ——.

SIRS: Take notice that the order of which the foregoing is a copy was this day filed and entered in the office of the clerk of the city and county of New York.

Yours, &c., DILLON & SWAYNE,
Def't's Att's.

Dated Dec. 7, 1883.

To Dos Passos Bros., pl'ff's att'ys.

25 STATE OF NEW YORK, } *ss:*
City and County of New York, }

I, Patrick Keenan, clerk of the said city and county and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original record on file in my office, and that the same is a correct transcript therefrom and the whole of such original record.

In witness whereof I have hereunto subscribed my name and affixed my official seal this fourteenth day of December, 1883.

[SEAL.] PATRICK KEENAN, *Clerk.*

(Endorsed:) N. Y. supreme court. Henry S. Marlor, plaintiff, against The Texas and Pacific Railway Co., defendant. Copy. Order for removal to U. S. circuit court S. D. N. Y. Dillon & Swayne, 195 Broadway, New York, attorneys for def't. To Dos Passos Bros., attorneys for pl'ff. Rec'd Dec. 7, 1883. U. S. circuit court. Filed Dec. 14, 1883. Timothy Griffith, clerk.

26 U. S. Circuit Court, Southern District of New York.

HENRY S. MARLOR
ag'st
THE TEXAS AND PACIFIC RAILWAY COMPANY.

This action having been commenced in the supreme court of New York, in the county of New York, and having been removed therefrom to this court on the petition of the defendant, The Texas and Pacific Railway Company, &c., pursuant to the provisions of the statutes of the United States applicable thereto, and the plaintiff having this day caused to be filed in the office of the clerk of this court a duly certified copy of the record of the cause in said supreme court, and the said plaintiff now duly appearing in the cause in this court by Dos Passos Bros., his attorneys, now, on motion of Dos Passos Bros., attorneys for said plaintiff, Henry S. Marlor, it is ordered that this action do proceed in this court the same in all respects as if it were originally commenced herein, and that
27 the said appearance for said plaintiff, Henry S. Marlor, be entered herein.

Dated Dec. 14, 1883.

DOS PASSOS BROS.,
Att'ys for Henry S. Marlor.

28 *Answer.*

United States Circuit Court, Southern District of New York.

HENRY S. MARLOR
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Dillon & Swayne, attorneys for defendant, 195 Broadway, New York.

U. S. circuit court. Filed Mar. 12, 1884.
TIMOTHY GRIFFITH, *Clerk.*

Due and timely service of the within answer is hereby admitted. Service of copies of bond and mortgage, annexed hereto as Exhibits A & B, is hereby waived.

Dated N. Y., March 11, '84.

DOS PASSOS BROS.,
Comp't's Sol'rs.

29 *Answer.*

United States Circuit Court, Southern District of New York.

HENRY S. MARLOR
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

The defendant, by Dillon and Swayne, its attorneys, answering the complaint herein:

I.

First. Admits that it was duly incorporated under and by virtue of the acts of Congress of the United States of America.

Second. It admits that on or about the 29th day of March, 1875,

the stockholders of defendant company, under and by virtue of its corporate powers and privileges, duly convened in corporate meeting, adopted, among others, a resolution authorizing the issue of eighty-nine hundred and eight income and land-grant bonds; but it alleges that only a part of said resolution is set forth in the second paragraph of the complaint, and that the full text of said resolution is as appears in paragraph first of part II of this answer.

Third. It admits that in pursuance of said resolution of de-
30 fendant's stockholders, and in pursuance of the authority conferred by its charter, and of the several acts of Congress of the United States of America under which defendant was incorporated, the said defendant caused to be made, executed, and issued eight thousand eight hundred and fifty-seven (of a total authorized issue of eight thousand nine hundred and eight) bonds, styled income and land-grant bonds, each of the general form and tenor as set forth in the copy of one of said bonds incorporated in the third article of the complaint. It admits that said bonds were duly signed by the president and secretary of defendant company, and were duly sealed with its seal, but it denies that said bonds were executed and issued on or about the 15th day of May, 1875, and alleges the fact to be that said bonds were executed at various dates thereafter, and were issued in sections or installments on several dates subsequent to said 15th of May, 1875, viz., a part as of January 1, 1876; a part as of July 1st, 1876, and a part as of July 1st, 1877.

Fourth. It denies any knowledge or information sufficient to form a belief as to the purchase by the plaintiff, at any place or at any time, of any of said income and land-grant bonds, and it denies any knowledge or information sufficient to form a belief as to the ownership by plaintiff, at any time, of any of said bonds in excess of 110 thereof. It alleges that all of said income and land-grant bonds are "registered" obligations, payable to a payee therein named or his assigns and not to bearer, and that frequently the registered holders of said bonds are not the actual holders or owners thereof. It further alleges that said 110 bonds, being the maximum number held by plaintiff at any time or times within the knowledge of defendant company, as derived from or shown by its registry of said bonds, were registered in the name of plaintiff in the amounts and of the dates as follows, viz., 50 of said bonds were registered
31 on the 1st day of May, 1881; 20 thereof on the 27th day of April, 1883, and 40 thereof on the 16th day of October, 1883. It alleges that the aggregate of the amounts thus registered, viz., 110 of said bonds, constituted the full amount of plaintiff's registered holdings at the time of the commencement of this action or at any time prior thereto. It denies any knowledge or information sufficient to form a belief as to whether plaintiff was at the time of the commencement of this action the actual holder or owner of any of defendant's said bonds.

Defendant denies each and every allegation in the fourth paragraph of the complaint contained, except as hereinbefore specifically admitted or denied.

Fifth. Defendant denies that it failed and neglected to exercis

the option, given to it in and by the terms of said bonds, to pay the plaintiff interest in scrip upon 150 income and land-grant bonds, as alleged in the fifth paragraph of said complaint.

Defendant saith that it cannot be ascertained until a reasonable time after the last day of June in each year what the net earnings as defined in the said bonds and the mortgage securing the same for the preceding year have been. It alleges that said option to pay in scrip was exercised although the resolutions of the executive committee of defendant company directing such payment in scrip were not passed on the first days of July, in the years 1882 and 1883 respectively. It denies each and every allegation of the fifth article of the complaint not hereinbefore specifically admitted or denied.

Sixth. Defendant denies any knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff has duly demanded the payment of the interest alleged to have become due as aforesaid on plaintiff's said bonds on the first days of July in the years 1882 and 1883. It alleges that diligent search of its records and inquiries of its proper officers have been made,
32. and that no record of such due demand appears, nor have its said officers any knowledge or information thereof; wherefore defendant denies that such demand was made.

It denies that it has refused and neglected to pay said interest in the manner provided in its said bonds and alleges that the plaintiff was notified that the defendant was ready to issue scrip, and scrip, according to the terms of said bonds, was offered to be delivered to plaintiff in respect of any and all bonds held by him prior to any demand as aforesaid of plaintiff for interest or scrip and prior to the institution of this suit. It denies each and every allegation contained in the sixth article of the complaint and not hereinbefore specifically admitted or denied.

II.

And for other and further defense defendant alleges—

First. That on the 29th day of March, 1875, defendant had outstanding bonds and mortgages securing the same, as follows:

(*a.*) 10,083 construction bonds, secured by first mortgage upon its lines of railway and their appurtenances east of Fort Worth, in the State of Texas.

(*b.*) 9,252 land-grant bonds, secured by a first mortgage upon all the lands in the State of Texas which the company had acquired or might thereafter acquire by virtue of its consolidation with the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company, or by virtue of its consolidation with or purchase of any other railroad company in the State of Texas under the authority of the acts of Congress of March 3d, 1871, and May 2d, 1872.

33 Defendant further alleges that both the construction bonds and the land-grant bonds last above described were fixed obligations of defendant company, whereon the obligation to pay maturing semi-annual interest coupons was absolute and without condition or qualification; that the mortgages securing said bonds

contained provisions for foreclosure in case of default in the payment of current interest, the provision to this effect in the mortgage securing said land-grant bonds being in the following terms:

"And if default shall be made in the payment of the interest which shall accrue or become due upon the said bonds or any of them for the space of sixty days, when the same shall become due the said trustees and the survivors of them and the successors and successor of such survivors may thereupon sell at public or private sale, for the best price which can be obtained for the same, all or any part of said lands which shall then remain unsold sufficient to pay the interest then remaining due upon any of said bonds which shall then be outstanding and unpaid, and such trustees may appoint one or more agents or attorneys to make sales, execute conveyances, and receive the purchase-money and pay the said interest then remaining unpaid on said bonds or any of them, or apply the same *pro rata*, if not sufficient to pay said interest in full."

Defendant prays that upon the trial of this cause it may have leave to refer the court to said construction and land-grant bonds and to the mortgages securing the same as part of this answer.

Defendant further alleges that on said 29th day of March, 1875, defendant's road was only partially completed to Fort Worth, in the State of Texas, there being then built and in operation about 325 miles thereof; that defendant was unable to meet the interest on said bonds and was in default therefor; that on said day the stockholders of defendant company met to consider and retrieve
34 the financial situation of the defendant, to readjust and reorganize its debt, to provide against recurring defaults which endangered foreclosure, and to provide means for completing its road to Fort Worth; and at said stockholders' meeting, held as aforesaid on the 29th day of March, 1875, did resolve as follows:

"Resolved, That the stockholders of the Texas and Pacific Railway Company, duly convened in corporate meeting, recommend to the board of directors of the company and hereby request, authorize, and fully empower them to provide for the indebtedness of the company, and also for the completion, ready for use and operation, of its lines of railway east to Fort Worth.

(*a*) First. By providing for the making and issuing forty-one hundred and ninety-two (4,192) bonds of the company, each for the sum of one thousand dollars ($1,000) in gold coin of the United States, or of two hundred pounds sterling money, bearing six per cent. interest per annum, running thirty years; the interest and the principal of said bonds to be payable in coin in the cities of London and New York, the amount of said loan being upon the basis of 8,000 dollars for each of the 524 miles of the company's lines of railway east of Fort Worth, and to secure the payment of the interest and principal of said bonds by a mortgage or deed of trust of all the company's lines of railways constructed and to be constructed from the State line between Louisiana and Texas westwardly through Marshall and Dallas to Fort Worth, in the State of Texas, and from Texarkana, on the State line between Texas and Arkansas, to a point of junction via Clarksville, Paris, Bonham, and Sherman, with the line afore-

said at or near Fort Worth, and from Marshall aforesaid, through the town of Jefferson, to a point of junction at or near Texarkana, with the said line from Texarkana to Fort Worth, together with all the depots, depot grounds, locomotives, rolling-stock of every kind, and every appurtenance of any kind, real or personal, requisite or convenient for the use and operation of said lines of railway; and also all and singular the chartered rights, liberties, and franchises of this company of every kind and description necessary for the construction and successful operation of said lines of railway, including also in said mortgage or deed of trust all the leasehold in-
35 terest of this company in the line of railroad of the Vicksburg, Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas, the proceeds of said bonds to be applied to the completion and equipment of the company's lines of railway east of Fort Worth and to the payment of the indebtedness of the company: Provided, however, That so much of the said lines of railway as extend between Sherman and Fort Worth, being in length about 81 miles, may be postponed as to its completion in the discretion of the board of directors, and that six hundred and forty-eight (648) of the bonds herein provided for shall be reserved and set aside and their proceeds applied only to that purpose: Provided, also, That a sinking fund shall be created for the protection of said bonds, to commence in its operations three years after their date and to amount to two per cent. of their face in each and every year thereafter.

(*b.*) Second. By providing for the making and issuing of thirteen thousand and one hundred (13,100) bonds of the company, each for the sum of one thousand dollars ($1,000) in gold coin of the United States or of two hundred pounds sterling money, bearing six per cent. interest per annum, running thirty years, the interest and the principal of said bonds to be payable in the cities of London and New York, the amount of said loan being upon the basis of 25,000 dollars for each of the 524 miles of the company's line of railway east of Fort Worth; and to secure the payment of the interest and principal of said bonds by a mortgage or deed of trust of all the company's lines of railway constructed and to be constructed from the State line between Louisiana and Texas westwardly through Marshall and Dallas to Fort Worth, in the State of Texas, and from Texarkana, on the State line between Texas and Arkansas, to a point of junction via Clarksville, Paris, Bonham, and Sherman with the line aforesaid at or near Fort Worth, and from Marshall aforesaid through the town of Jefferson to a point of junction at or near Texarkana with the said line from Texarkana to Fort Worth, together with all the depots, depot grounds, locomotives, rolling-stock of every kind, and every appurtenance of any kind, real or personal, requisite or convenient for the use and operation of said
36 lines of railway; and also all and singular the chartered rights, liberties, and franchises of this company of every kind and description necessary for the construction and successful opera-

tion of said lines of railway, including also in said mortgage or deed of trust all the leasehold interest of this company in the line of railroad of the Vicksburg, Shreveport & Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas & Pacific Railway Company at the State line between Louisiana and Texas, the proceeds of said bonds to be applied to the completion and equipment of the company's lines of railway east of Fort Worth and to the payment of the indebtedness of the company: Provided, however, That as much of the said lines of railway as extend between Sherman and Fort Worth, being in length about 81 miles, may be postponed as to its completion in the discretion of the board of directors, and that two thousand and twenty-five (2,025) of the bonds herein provided for shall be reserved and set aside and their proceeds applied only to that purpose: Provided, also, That a sinking fund shall be created for the protection of said bonds, to commence in its operations ten years after their date and to amount to one per cent. of their face in each and every year thereafter.

(c.) Resolved, That the board of directors shall be, and they are hereby, requested and fully authorized and empowered to provide for and to issue eighty-nine hundred and eight (8,908) income and land-grant bonds, each for the sum of one thousand dollars, bearing seven per cent. interest, the interest and the principal of said bonds to be payable in United States currency, and said bonds to mature in forty years from their date, and to secure the payment of the interest and the principal of said bonds by a first mortgage upon all the lands heretofore granted to this company or in which this company in said State is in any manner interested, being a first lien or charge upon all those sections or parts of sections or square miles of land acquired by the Texas & Pacific Railroad Company or to be acquired by said company in constructing its lines of road east of Fort Worth, under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Memphis, El Paso and Pacific Railroad Com-
37 pany, or of the several supplements and amendments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas and applicable to said companies, or either of them, or to the Texas and Pacific Railway Company, the total quantity of land so to be acquired in constructing said lines of railway being estimated at about 7,600,000 acres; and said mortgage or deed of trust shall also include the net income of the company from the operating of its lines east of Fort Worth, after providing for the operating expenses, the current repairs and reconstructions, and the interest on the first and second mortgages hereinbefore provided for; and there shall be included in said mortgage or deed of trust a provision for a sinking fund out of the net proceeds of sales of land and by the receiving of said bonds in payment for purchases of lands covered by the mortgage. The bonds thus provided for shall be exchangeable for outstanding land-grant bonds, and used in purchase of material and supplies, and for cou-

struction work, or may be applied toward the payment of any of the company's indebtedness or obligations."

Defendant states that in pursuance of the authority conferred in and by the aforesaid resolutions the board of directors of defendant company caused to be made, executed, and issued:

(*a*.) 4,192 bonds, secured by a first mortgage, as prescribed in said resolutions, and entitled first mortgage bonds, to which bonds and to the mortgage securing the same defendant prays that it may be permitted to refer as aforesaid on the trial of this cause.

(*b*.) 13,100 consolidated bonds, secured by a second mortgage, as prescribed in said resolutions, to which bonds and the mortgage securing the same defendant also craves leave so to refer.

(*c*.) 8,857 income and land-grant bonds, secured by mortgage executed as prescribed in said resolutions, a copy of one which said bonds and of the mortgage securing said bonds are annexed hereto, made parts hereof, and marked Exhibits "A" and "B," respectively.

38 Second. Defendant further alleges that of the obligations issued in pursuance of said resolutions of its stockholders, adopted as aforesaid on the 29th day of March, 1875, the two classes designated as (*a*) first mortgage bonds and (*b*) consolidated mortgage bonds were authorized to be issued, and were in fact issued as fixed and peremptory obligations of defendant company in respect of the interest thereon; that said bonds of both said classes were made to bear six per cent. interest, and attached to said bonds were coupons payable semi-annually, absolutely and at all events; that in each of the mortgages securing the bonds, respectively, of the two classes last mentioned were incorporated the following provisions, set forth in articles 4 and 5 of each of said mortgages:

"Article fourth. These presents are made upon this further condition that if default shall be made in the payment of the interest which shall accrue or become due upon the said bonds or any of them, or any part thereof, then and in every such case it shall be the duty of the said trustees, at the request of any bondholder, forthwith to make a demand upon the president or treasurer of the company, if any there shall be, or any officer representing said company, that payment of said interest so in arrears and unpaid be forthwith made; and if said railway company shall continue to make default in the payment of such interest for the space of sixty days after such demand, the said trustees shall, and they are hereby fully authorized and empowered to, enter upon and take possession of the entire portion of said railway mortgaged, with all and singular the appurtenances thereto belonging or in any way appertaining, or so far as said road may then be constructed and in operation, or any part thereof, at their option, together with all and singular the other furniture, equipments, rolling-stock, depots, and appurtenances, as hereinbefore described; and said trustees are hereby fully authorized and empowered to take into possession without process of law or other legal proceeding, and to use, operate, and work said railway or such part as may be in default, and receive the earnings, income,

and profits of the same, paying from said income and earn-
39 ings the expenses of running or operating said railway and all needful and necessary repairs to the same until the net profits arising from the earnings of said railway shall be sufficient to pay and discharge such arrears, with interest, in full, when and whereupon the said railway, with all its appurtenances aforesaid, shall be surrendered and delivered up to the said party of the first part, it being understood that the said trustees, while they shall be so in possession of said railway, shall have free access to all the books of the company, and shall have the right to make and pay out of said earnings for all necessary repairs to said road, its equipments and appurtenances, and may pay any floating debt or debts of the company, as well as their own expenses and reasonable charges and costs, out of the earnings of the said road.

"Article fifth. In case default shall be made in the payment of any interest upon said bonds when the same shall become due and payable, and such default shall continue for six months after the same has been demanded, the whole principal sum mentioned in each and all of said bonds then outstanding shall, at the option of the holders of a majority in interest of said bonds, forthwith become due and payable; and in case default shall be so made and continue as aforesaid the party of the second part, its successor or successors in this trust, may also, and upon the written request of the holders of at least one thousand of such bonds then outstanding, amounting to one million dollars, shall, foreclose this mortgage by legal proceedings and sell or cause to be sold the said railway, franchises, and property, real and personal, hereby conveyed or intended so to be as security for said bonds and all benefit or equity of redemption of the party of the first part in and to the same and every part thereof, with the benefit of the franchises aforesaid; which said last-mentioned sale shall be at public auction at the city of New York or at Marshall, Texas, on previous notice of the time and place of such sale by advertisement published not less than three times a week for ten weeks in at least two newspapers of general circulation published in the city of New York, two in the city of Philadelphia, and two in the State of Texas, and in such other places as may be required by law, and in such case said party of the second part,
its successor or successors in this trust, shall make and
40 deliver to the purchasers of the said premises good and sufficient deeds of conveyance for the same in fee-simple, and said sale and conveyance shall be a perpetual bar, both in law and equity, against the party of the first part, its successors and assigns, and all other persons claiming by, through, or under them, of all right, title, interest, or claim in or to said railways, premises, and property and every part and parcel thereof, and in case of such sale the party of the second part, its successor or successors, may bid for and purchase said property, real or personal, or any part thereof, in behalf of the holders of said bonds.

"In case of such sale the said party of the second part shall deduct from the proceeds of such sale its just allowance for the expenses thereof, including attorneys' and counsel fees and all expenses which

may have been incurred in operating, managing, or maintaining the said railways or in managing the business thereof, as well as just compensation for its own services, and thereafter shall apply so much of the said proceeds as may be necessary to the payment of the principal and interest of the said bonds then remaining unpaid, *pro rata*, without discrimination or preference, and any surplus remaining after such payment shall be paid over to the said party of the first part, or as any court of competent jurisdiction shall order.

"And it is hereby declared that the receipt or receipts of the party of the second part, its successor or successors, shall be a sufficient discharge to the purchaser or purchasers of the premises hereby mortgaged or any part thereof and so sold as aforesaid for his or their purchase-money, and that such purchaser or purchasers having such receipts shall not, after the payment thereof, be bound to see to the application of said moneys, or be in any manner answerable for the loss or misapplication thereof."

Defendant states that said income and land-grant bonds, authorized as aforesaid under the same series of resolutions as that under which the said first and consolidated mortgage bonds were authorized, were not intended to be nor to be executed or issued as fixed and peremptory obligations of defendant company whereon current yearly installments of interest are to be paid, absolutely,
41 presently, and at all events; but defendant states that said income and land-grant bonds were intended to be executed and issued as, and were intended to be obligations whereon, present liability for the payment of current interest in any form should be conditional upon the acquirement of sufficient net revenues therefor, and that said bonds, in pursuance of the authority conferred by the resolutions of defendant's stockholders aforesaid, were intended to be executed, issued, and to operate as what is commonly known as cumulative income obligations—that is to say, if in any one year sufficient net earnings are acquired to enable the company to pay the interest on said bonds such interest must be paid, but if such net earnings are insufficient therefor the obligation to pay such interest rests in abeyance until sufficient net earnings shall be acquired, or otherwise such interest accumulates during the life of the obligation, except that in the present case the company reserved an option to forestall such accumulation by issuing scrip for such interest. Defendant states that prior to the institution of this action the uniform practical construction of said income and land-grant bonds, both by defendant, by its bondholders, upon the stock exchange, and by the public was that defendant's present liability for interest in any form on said bonds was conditional upon the acquirement of sufficient net earnings, and that said option arising in case of insufficient net earnings to enable the company to pay its interest to issue scrip for such interest has never been treated or regarded by defendant or by its bondholders as an alternative obligation resting on defendant company, but that said option has uniformly been treated and regarded by said parties as a privilege reserved to defendant company in no way affecting, through its exercise or non-exercise, present liability for interest, and defendant now alleges that the

office of the said option has uniformly been regarded by said parties as enabling defendant to discharge any future liability by issuing scrip for interest, in respect to which interest present liability has not been incurred by reason of the insufficiency of net earnings.

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Third. Defendant further alleges that subsequently to the first day of January, 1876 (as of which date the first installment of said income and land-grant bonds was issued as aforesaid), and in the years or interest periods ending, respectively, on the first days of July, 1877, 1878, and 1879, the net earnings of defendant company, as defined in said bonds and in the mortgage referred to in said bonds, were insufficient to enable it to pay the interest on its said income and land-grant bonds then outstanding at the various dates aforesaid; that during and throughout said years or interest periods no interest was paid upon said bonds nor was any scrip issued for such interest or for any portion thereof; that on the 16th day of February, 1880, in compliance with the solicitations of certain of the holders of said bonds, and in pursuance of a resolution of its board of directors, defendant issued scrip for the interest accumulated during the entire period included between the said first day of January, 1876, and the first day of July, 1879, as appears upon the face of said scrip; that the net earnings of defendant's road having been so insufficient to enable it to pay the interest on said bonds for the years ending July 1st, 1880, and July 1st, 1881, defendant issued scrip for the interest for such years, respectively.

Fourth. Defendant further alleges that there were no net earnings upon its said road, as net earnings are described in said income and land-grant bonds and in the mortgage referred to in the said bonds for the year ending July 1st, 1882, and for the year ending July 1st, 1883; and that this fact was promptly published and declared by defendant company to the public and to its bondholders, and that the plaintiff had due notice thereof. Defendant, on information and belief, states that before any demand was made by the plaintiff as aforesaid in respect to the bonds in suit, for the payment of interest, this defendant exercised, by due corporate resolution, the option to issue scrip for said interest, as provided in said bonds and mortgage, and that the plaintiff had notice of such action; that defendant notified the plaintiff that it was ready and willing to issue such scrip to him, and it states that it is still so ready and willing, and it now offers to issue and deliver to the plaintiff such scrip in respect of all bonds owned by him on the production thereof, and it offers to bring said scrip into court for the said plaintiff.

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That since such exercise by defendant of its option to issue scrip as aforesaid it has issued and delivered to bondholders requesting the same said scrip in large amounts, viz., about $450,000, at the date of the filing hereof, and is now constantly issuing and delivering such scrip to the holders of its said income and land-grant bonds on their demand or request therefor.

The defendant alleges said income and land-grant bonds have at all times since their first issue been worth much less than the said

first-mortgage bonds and said consolidated mortgage bonds, and worth less than par, and the scrip much less than the income and land-grant bonds; that at the date of the filing of this answer the market value of said income and land-grant bonds is about 50 per cent. and of said scrip about 42 per cent.

Fifth. Defendant further alleges that its said income and land-grant bonds are, as aforesaid, registered obligations; that interest thereupon is payable only to registered holders thereof or to their assignees by duly executed and acknowledged or authenticated order or assignment, at the office of defendant company and upon the delivery by such registered holders or their assignees by duly executed and authenticated order or assignment of receipts for such
44 interest, or, in case scrip is issued, of receipts for such scrip; that by uniform and invariable practice, from the first issue of scrip for said bonds, such bonds or such authenticated orders or assignments thereof are presented by the payee or registered holder or such assignee at the office of the defendant for scrip; that when scrip is delivered thereon no indorsement is made upon the bond, but the receipt or voucher for such scrip so issued and received is signed by the person receiving the same, and the defendant cannot know to whom to issue or deliver scrip or who is entitled thereto or who will receive the same until the said bonds or such assignments or orders are presented at its office as aforesaid and scrip demanded thereon, or unless the registered holder, properly identified, presents himself at the office of the company and demands the issue of the scrip. And the defendant says, on information and belief (as in paragraph sixth, part I, hereof), that the said plaintiff, in respect of the said interest sued for herein, never presented the said bonds and demanded or requested the issue of scrip for the years 1882 and 1883; but the defendant says that it has offered to deliver and is now ready to deliver scrip to the plaintiff for and in respect of the said bonds in suit, for the years 1882 and 1883, on the production of said bonds and the execution of the proper voucher or receipt for such scrip.

Wherefore defendant demands judgment against the plaintiff that the complaint herein be dismissed with costs.

DILLON & SWAYNE,
Attorneys for Defendant.

45 SOUTHERN DISTRICT OF NEW YORK, *ss:*

C. E. Satterlee, being duly sworn, says that he is the secretary and treasurer of the Texas and Pacific Railway Company, the defendant in the above-entitled cause; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. Deponent says that this answer is verified by the secretary and treasurer of defendant company for the reason that the president thereof is absent from the State of New York.

C. E. SATTERLEE.

Sworn to before me this 11th day of March, 1884.

WM. J. HARDING,
Notary Public, Kings County, New York.

Certificate filed in New York county.

46 *Registered Bond.*

UNITED STATES OF AMERICA.

1,000. 1,000.

The Texas and Pacific Railway Company.

Chartered by act of Congress.

Seven per Cent. Income and Land-Grant Bond, Eastern Division.

No. —. No. —.

The Texas and Pacific Railway Company hereby acknowledges itself to be indebted to —— ——, of ——, or assigns, in the sum of one thousand dollars, lawful money of the United States of America, which sum the said company promises to pay to the said —— —— or assigns, at the office of the company in the city of New York, on the first day of January, A. D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent. per annum, payable annually, on the first day of July in each year, as provided in the mortgage hereinafter mentioned.

This bond is one of a series of bonds, numbered consecutively from one to eight thousand nine hundred and eight, of the denomination of one thousand dollars each, of like tenor and date, the payment whereof is secured by a mortgage, of even date herewith, duly recorded, upon certain lands heretofore granted to the Texas and Pacific Railway Company by the State of Texas or in which said company is in any manner interested, being a first lien or charge upon all those sections or fractional sections or square miles of land acquired or to be acquired by said company in constructing its lines of road east of Fort Worth under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railroad Company, the Memphis, El Paso, and Pacific Railroad Company or of the several supplements and enactments relating thereto or under any of the special or general laws passed by the Legislature of the State of Texas and applicable to said companies or either of them or to the Texas and Pacific Railway Company, the total quantity of land to be acquired in constructing said lines of railway under the several grants being estimated at or about 7,600,000 acres; this bond has also, as security for the interest, a mortgage lien upon the net income of the said Texas and Pacific Railway Company derived from operating its lines of railway east of Fort Worth, in the State of Texas, after providing for the operating expenses, the current repairs and reconstructions, and the interest upon the first and second mortgage bonds, secured upon said lines of railway, the length of which, constructed and to be constructed, is estimated to be 524 miles, and in case such net earnings shall not in any one year be sufficient to enable the company to pay seven per cent. interest on the outstanding bonds, then scrip may at

the option of the company be issued for the interest, such scrip to be received at par and interest the same as money in payment for any of the company's lands acquired as aforesaid in Texas at the ordinary schedule price, or it may be converted into capital stock of the company when presented in amounts of $100, or its multiple.

The holder of this bond is entitled to the benefit of the additional security of the sinking fund provided for in said mortgage, consisting of the net proceeds of the sales of the lands aforesaid, which are to be applied from time to time to the purchase of said bonds at their market value, not exceeding par, or to their redemption, as provided in the mortgage aforesaid; this bond also will be received by the company at par and accrued interest in payment or exchange for any of its lands covered by the mortgage aforesaid at the current cash price of the same as fixed from time to time.

In witness whereof the said The Texas and Pacific Railway Company has caused these presents to be duly executed, sealed with its corporate seal, and attested by the proper signatures of its president or vice-president and secretary this — day of May, A. D. 1875.

Attest: —— ——, *President.*
—— ——, *Secretary.*

[Stamped:] American Bank Note Co., Philadelphia. Specimen.

[Endorsed.]

47 Specimen.

EXHIBIT A.

Trustees' Certificate.

No. —. 1,000.

The Texas and Pacific Railway Company, Eastern Division, income and land-grant seven per cent. registered bond. Principal due 1915. Interest payable July 1st, in the city of New York, with sinking fund to consist of entire net proceeds of sales of Texas lands. Interest secured by mortgage on the net revenue from 524 miles of railway.

This bond is one of a series of bonds, each for the sum of one thousand dollars, lawful money of the United States of America, bearing seven per cent. interest per annum, payable yearly, said bonds being numbered consecutively from number one to number eight thousand nine hundred and eight. The said bonds are secured by a first mortgage upon all the lands of the Texas and Pacific Railway Company in the State of Texas, granted in aid of the construction of its lines east of Fort Worth, and also upon the net income of said lines of railway after deducting current expenses, reconstruction and repairs, and the interest upon the first and second mortgages on said lines of railway; and they are also receivable the same as money in payment or exchange for such lands at the current price of the same as fixed from time to time.

—— ——,
—— ——,
Trustees.

Extracts from Acts of Congress Authorizing Issue of the within Bond.

Act March 3rd, 1871, section eleventh.

That the Texas Pacific Railroad Company shall have power and authority to issue two kinds of bonds secured by mortgage, namely: First, construction bonds; second, land bonds.

That all the mortgages made and executed by said railroad company shall be filed and recorded in the Department of the Interior, which shall be sufficient evidence of their legal execution, and shall confer all the rights and property of said company as therein expressed.

Act May 2nd, 1872, section second.

That the said The Texas and Pacific Railway Company shall have power and authority to issue the land bonds authorized by the eleventh section of said act of incorporation, and to include in the mortgage or mortgages to secure said land bonds all or any portion of the lands acquired by the terms of consolidation lawfully authorized by the fourth section of said act of March 3rd, 1871, with any railroad company or companies to whom grants of land may have been made or may hereafter be made by any Congressional, State, or Territorial authority, or who may have purchased the same previous to any such arrangement or consolidation, and within the time limited for the completion of the road, but the amount of said land bonds shall not exceed two and a half dollars per acre for all lands covered by the mortgage or mortgages securing the same.

Date of transfer.	Transferred to.	Transfer officer.

48 EXHIBIT B.

Income & Land-Grant Mortgage, Dated May 15th, 1875, and Supplemental Mortgage, Dated March 23d, 1876.

Texas & Pacific Railway Co. to W. T. Walters and Geo. D. Krumbhaar, trustees.

To secure an issue of $8,908,000 seven per cent. currency bonds.

49 This indenture, made the fifteenth day of May, anno Domini 1875, by and between the Texas and Pacific Railway Company, a corporation created by and existing under the laws of the United States, party of the first part, and William T. Walters and

George D. Krumbhaar, trustees, as hereinafter mentioned and described, party of the second part, witnesseth:

Whereas the Texas Pacific Railroad Company was, by its charter, duly authorized and empowered to build a line of railway, complete, with all its appurtenances, from a point at or near Marshall, in the county of Harrison and State of Texas, westwardly through New Mexico and Arizona to the Pacific Ocean, at San Diego, in the State of California, and by its charter and by other congressional and legislative acts was duly authorized and empowered to unite and consolidate with other railroad companies and acquire all their property, rights, and franchises; and

Whereas, in pursuance of such congressional and legislative authority, the said Texas Pacific Railroad Company did purchase and consolidate with itself the Southern Pacific Railroad Company by deed of consolidation dated March 21, 1872, and did also purchase and consolidate with itself the Southern Transcontinental Railway Company by deed of consolidation dated March 30, 1872, and subsequently, in June, 1873, did acquire by purchase the land grant, reservation, franchise, and other property of the Memphis, El Paso and Pacific Railroad Company; and

Whereas, by an act of Congress of the United States of May 2, 1872, the name and title of said corporation was duly changed to that of the Texas and Pacific Railway Company; and

Whereas the said Southern Pacific Railroad Company and the said Southern Transcontinental Railway Company and the said Memphis, El Paso and Pacific Railroad Company are corporations each chartered under the laws of the State of Texas and have each received or are entitled to receive large grants of land from the State of Texas, which said grants of land are now the property of and belong to the said The Texas and Pacific Railway Company by virtue of the purchases and consolidations above mentioned; and

Whereas the said The Texas and Pacific Railway Company, in accordance with the powers and provisions contained in its charter, has heretofore authorized an issue of its land bonds in the sum of twenty millions of dollars, secured by mortgage dated July 1st, 1872, to Edwards Pierrepont and W. T. Walters, trustees, upon all the lands in the State of Texas which the said company has acquired or may hereafter acquire by virtue of its consolidation with the Southern Pacific Railroad Company and with the Southern Transcontinental Railway Company, as hereinbefore mentioned, and under said mortgage nine thousand two hundred and fifty-two (9,252) bonds, each for one thousand (1,000) dollars, have been issued, all of which are to be recalled and retired, as hereinafter provided; and

Whereas the said company, having already completed and equipped a large part of its lines of railway east of Fort Worth, in the
50 State of Texas, designs to complete, equip, and stock ready for use the whole of said lines east of Fort Worth, being in all about five hundred and twenty-four (524) miles of railway; and for this purpose being fully empowered by law to issue bonds and the same

to make secure and protect by mortgages or deeds of trust covering the whole or any part of its lines of railway, with the appurtenances, and all or any of the estates and property of the company, with its franchises and corporate rights or privileges, has provided by mortgages or deeds of trust and issues of bonds protected by the same, at the rate of twenty-five thousand (25,000) dollars per mile upon each of said five hundred and twenty-four (524) miles of railway and upon its appurtenances and equipments, for the construction, completion, and equipment ready for use of said lines of railway east of Fort Worth, in the State of Texas; reference to which deeds of trust two in number, duly filed in the Department of the Interior at Washington, is hereby made; and

Whereas the stockholders of said company, duly convened in corporate meeting on the twenty-ninth day of March, 1875, after authorizing and providing by their resolutions for the issuing of bonds and the protection of the same by mortgages or deeds of trust, said bonds being at the rate of twenty-five thousand (25,000) dollars per mile of completed road, the proceeds of the same to be applied to the completion and equipment of said five hundred and twenty-four (524) miles of railway and to the payment of the indebtedness of the company, did

Resolve, That the board of directors shall be, and they are hereby, requested and fully authorized and empowered to provide for and to issue eighty-nine hundred and eight (8,908) income and land-grant bonds, each for the sum of one thousand dollars, bearing seven per cent. interest, the interest and the principal of said bonds to be payable in United States currency and said bonds to mature in forty years from their date, and to secure the payment of the interest and the principal of said bonds by a first mortgage upon all the lands heretofore granted to this company or in which this company in said State is in any manner interested, being a first lien or charge upon all those sections or parts of sections or square miles of land acquired by the Texas and Pacific Railroad Company or to be acquired by said company in constructing its lines of road east of Fort Worth under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and amendments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas and applicable to said companies or either of them or to the Texas and Pacific Railway Company, the total quantity of land so to be acquired in constructing said lines of railway being estimated at about 7,600,000 acres; and said mortgage or deed of trust shall also include the net income of the company from the operating of its lines east of Fort Worth after providing for the operating expenses, the current repairs and reconstructions, and the interest on the first and second mortgages hereinbefore provided for; and there shall be included in said mortgage or deed of trust a provision for a sinking fund out of the net proceeds of sales of land and by the receiving of said bonds in payment for purchases of lands covered by the mortgage. The bonds

thus provided for shall be exchangeable for outstanding land-grant bonds, and used in purchase of material and supplies and for construction work, or may be applied toward the payment of any of the company's indebtedness or obligations.

And the board of directors, in pursuance of the power and authority conferred upon them by the stockholders, did approve a bond in the words and figures following:

51 THE UNITED STATES OF AMERICA.

(No. —.) ($1,000.)

The Texas and Pacific Railway Company.

Chartered by act of Congress.

Seven per Cent. Income and Land-Grant Bond on Eastern Division.

The Texas and Pacific Railway Company hereby acknowledges itself to be indebted to —— ——, of ——, or assigns in the sum of one thousand dollars, lawful money of the United States of America; which sum the said company promises to pay to the said —— —— or assigns, at the office of the company in the city of New York, on the first day of January, A. D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent. per annum, payable annually on the first day of July in each year, as provided in the mortgage hereinafter mentioned.

This bond is one of a series of bonds numbered consecutively from one to eight thousand nine hundred and eight, of the denomination of one thousand dollars each, of like tenor and date, the payment whereof is secured by a first mortgage of even date herewith, duly recorded, upon certain lands heretofore granted to the Texas and Pacific Railway Company by the State of Texas, or in which said company is in any manner interested, being a first lien or charge upon all those sections or fractional sections or square miles of land acquired or to be acquired by said company in constructing its lines of road east of Fort Worth under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railroad Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and enactments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas and applicable to said companies or either of them, or to the Texas and Pacific Railway Company, the total quantity of land to be acquired in constructing said lines of railway under the several grants being estimated at or about 7,600,000 acres. This bond has also as security for the interest a mortgage lien upon the net income of the said The Texas and Pacific Railway Company, derived from operating its lines of railway east of Fort Worth, in the State of Texas, after providing for the operating expenses, the current repairs and reconstructions, and the interest upon the first and second mortgage bonds secured upon said lines of railway, the length of which, constructed and to be constructed, is estimated to be 524 miles, and in case such net earn-

ings shall not, in any one year, be sufficient to enable the company to pay 7 per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest; such scrip to be received at par and interest the same as money in payment for any of the company's lands acquired as aforesaid in Texas at the ordinary schedule price, or it may be converted into capital stock of the company when presented in amounts of $100 or its multiple. The holder of this bond is entitled to the benefit of the additional security of the sinking fund provided for in said mortgage, consisting of the net proceeds of the sales of the lands aforesaid, which are to be applied from time to time to the purchase of said bonds at their market value, not exceeding par, or to
52 their redemption, as provided in the mortgage aforesaid; this bond also will be received by the company at par and accrued interest in payment or exchange for any of its lands covered by the mortgage aforesaid at the current cash price of the same as fixed from time to time.

In witness whereof the said The Texas and Pacific Railway Company has caused these presents to be duly executed, sealed with its corporate seal, and attested by the proper signatures of its president or vice-president and secretary, this 15th day of May, A. D. 1875.

—— ——, *President.*

Attest: —— ——, *Secretary.*

Certificate of Trustees.

This bond is one of a series of bonds, each for the sum of one thousand dollars, lawful money of the United States of America, bearing seven per cent. interest per annum, payable yearly, said bonds being numbered consecutively from number one to number eight thousand nine hundred and eight. The said bonds are secured by a first mortgage upon all the lands of the Texas and Pacific Railway Company in the State of Texas granted in aid of the construction of its lines east of Fort Worth, and also upon the net income of said lines of railway, after deducting current expenses, reconstruction and repairs, and the interest upon the first and second mortgages on said lines of railway; and they are also receivable the same as money in payment or exchange for such lands at the current price of the same as fixed from time to time.

—— ——,

—— ——,

Trustees.

And whereas the said board of directors, in execution of the power conferred upon them by the stockholders, did adopt, authorize, and approve this form of mortgage or deed of trust for the purpose of securing the said bond:

Now this indenture witnesseth: That the said party hereto of the first part, for and in consideration of the premises and of the sum of one dollar to it duly paid by the party hereto of the second part, in order to secure the payment of the principal and interest of the said eighty-nine hundred and eight (8,908) bonds, according to the

tenor thereof, hath granted, bargained, sold, assigned, transferred, and conveyed, and by these presents doth grant, bargain, sell, assign, transfer, and convey, unto the said party of the second part, its and their lawful successor or successors in the trust hereby created
53 and its and their assigns, all the lands heretofore granted to this company or in which this company in the State of Texas is in any manner interested, being all those sections or parts of sections or square miles of land acquired by the Texas and Pacific Railway Company or to be acquired by said company in constructing its lines of road east of Fort Worth, in the State of Texas, under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railroad Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and amendments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas and applicable to said companies or either of them, or to the Texas and Pacific Railway Company, the total quantity of lands so to be acquired in constructing said lines of railway being estimated at about 7,600,000 acres of land; also all the net income of the lines of railway and appurtenances of the said The Texas and Pacific Railway Company east of Fort Worth, in the State of Texas, being five hundred and twenty-four miles of railroad nearly completed, after deducting the expenses of operating and maintaining the same, and the interest and other resources due by reason of previous circumstances thereon, the same being the Texas and Pacific Railway Company's lines of railway, constructed and to be constructed, from the State line between Louisiana and Texas westward through Marshall and Dallas to Fort Worth, in the State of Texas, and from Texarkana, on the State line between Texas and Arkansas, to a point of junction via Clarksville, Paris, Bonham, and Sherman, with the line aforesaid at or near Fort Worth, and from Marshall aforesaid through the town of Jefferson to a point of junction at or near Texarkana with the said line from Texarkana to Fort Worth, together with all the depots, depot grounds, locomotives, rolling-stock of every kind, and every appurtenance of every kind, real or personal, requisite or convenient for the use and operation of said lines of railway, including, also, all the net income arising from the leasehold interest of said company in the line of railroad of the Vicksburg, Shreveport and Texas Railroad Company extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas.

In trust, nevertheless, and upon the terms, trusts, and conditions and with the powers herein expressed.

Article first. SECTION 1. No one of said bonds shall be deemed issued or be valid or secured by this mortgage until there shall have been endorsed upon it a certificate duly signed by the party of the second part, its successors or successor in this trust, to the effect following, viz:

Trustees' Certificate.

This bond is one of a series of bonds, each for the sum of one thousand dollars, lawful money of the United States of America, bearing seven per cent. interest per annum, payable yearly, said bonds being numbered consecutively from number one to number eight thousand nine hundred and eight. The said bonds are secured by a first mortgage upon the lands of The Texas and Pacific Railway Company, in the State of Texas, granted in aid of the construction of its lines east of Fort Worth, and also
54 upon the net income of said lines of railway after deducting current expenses, reconstruction and repairs, and the interest upon the first and second mortgages on said lines of railway; and they are also receivable the same as money in payment or exchange for such lands at the current price of the same as fixed from time to time.

SEC. 2. No bonds shall be issued and secured under this mortgage until at least two million two hundred and fifty-four thousand (2,254,000) dollars of the outstanding land-grant bonds heretofore issued, as hereinbefore recited, under the mortgage to Edwards Pierrepont and William T. Walters, trustees, shall be deposited by the California and Texas Railway Construction Company with the party of the second part hereto, and shall be registered in the names of the second party, to be held as additional security for the bonds to be issued hereunder, until all of such land-grant bonds shall have been so deposited or retired by the company and the mortgage satisfied of record.

SEC. 3. After the deposit of bonds as aforesaid the holders of any outstanding land-grant bonds shall have the right, until January 1, 1876, to exchange their bonds, with accrued interest thereon at par, for the bonds issued under this mortgage at par, the bonds so received in exchange to be registered and held by the trustees as additional security, as provided in the preceding section.

SEC. 4. After January 1st, 1876, the remainder of the bonds so to be issued and secured under this mortgage and exchanged for land-grant bonds may be issued and disposed of as the board of directors may determine.

Article second. It is further mutually agreed by and between the parties hereto that the said party of the first part will, with all reasonable despatch, make and deliver to the said party of the second part true and accurate lists, schedules, and maps showing the numbers, precise quantity of lands, the location, position, and boundaries of each and every piece, parcel, section, or parts of sections of the aforesaid lands now owned, or any lands which may be hereafter owned or acquired, by it not required for the necessary or convenient operation of the railroad of the party of the first part; and also lists and schedules showing the minimum valuation and prices at which the respective pieces, parcels, sections, or parts of sections of said lands may be sold and conveyed as hereinafter provided, which lists shall be approved by the board of directors and signed by the president and secretary of the party of the first part, and also ap-

proved and signed by the party of the second part; but it is understood and agreed by and between the parties hereto that the said party of the first part, by and with the consent and approval in writing of the party of the second part, or of its successor or successors in this trust, may at any time, not oftener than once in each year, from the date of the last approval by the party of the second part revalue all of said lands not then sold, and reaffix to each parcel or section of the then unsold lands a new minimum price, and upon the approval of the said party of the second part of such new valuation or minimum prices, the same shall thereafter become binding upon both parties.

And that the said party of the first part, with the consent in writing of said party of the second part, its successor or successors in this trust, may sell and convey any such lands not necessary or required to be retained for the convenience and use of the
55 company, and that whenever the said party of the first part shall from time to time certify to said trustees that it has sold or contracted for the sale of any sections, parcel, or parcels of said lands the said trustee, its successor or successors in this trust, shall and will join with the said party of the first part in duly executing a deed or contract sufficient in law to convey to the purchaser, his heirs or assigns, all the right, title, interest, property, possession, claim, demand, and estate of both the parties to this indenture in and to the parcel or section of land so sold; and the said party of the second part shall and will deliver such deed or contract to such purchaser upon receiving from him the whole price of such parcel or section of land, either in cash, or, if such land be sold upon credit, then upon receiving from such purchaser such portion of the said price as shall be agreed to be paid in cash (which shall not be less than ten per cent. of the whole price), together with a bond for the residue of the purchase-money, secured by mortgage upon the land thus sold, executed by the purchaser to said party of the second part in due form, to secure to it the payment of the residue, with interest thereon at the rate of not less than seven per cent. per annum, payable semi-annually or annually, and every such bond and mortgage shall contain a provision to the effect that in case the interest thereon shall remain in arrear and unpaid for six months after the same shall become due, then the whole amount of the principal sum mentioned therein shall thereupon, immediately after the expiration of the said six months, become due and payable, and every such mortgage shall also contain a personal obligation on the part of the purchaser and mortgagor to pay the principal and interest thereby secured at the times and according to the terms, tenor, and legal effect of said bond therein mentioned. The deeds so to be given shall bear even date with the bonds and mortgages so to be executed, and shall specify the actual and true amount of the whole consideration money or price and the manner in which the same has been paid or secured. Every such bond and mortgage shall be held by said trustee for the purpose of the trusts herein declared and as part of the trust estate and as security for the bonds this mortgage is given to secure.

Sales may also be made in like manner of any section or parcel

of said land at less than the minimum prices affixed to the same as aforesaid: Provided, That the president or vice-president and land commissioner of the said railway company shall make and furnish to said trustees an affidavit that the price agreed on is, in their opinion, the full market value of the land so agreed to be sold: And provided, That the aggregate on all sales then previously made shall be equal to or above the aggregate of all the lands sold as specified in said schedule. No bond and mortgage taken for the lands sold shall run more than ten years.

The consideration money in any such sales of said land may be paid either in whole or in part by delivering to said trustees to be cancelled one or more of the said series of bonds which may have been issued by the said railway company as aforesaid at their par value and interest accrued, and payments upon any such mortgage of the purchaser of any of said lands may be made by delivering to said trustees one or more of said bonds of the said railway company as aforesaid at their par value and accrued interest, amounting in the aggregate to said consideration or purchase money, and two or more purchasers of said lands may unite and pay a part or all of the aggregate amount of consideration money of their purchases or a part of all the aggregate amount of their mortgages by delivering to said trustees said bonds to the amount of such payments to be cancelled.

56 And it is further provided by these presents that if the lands which the said railway company is entitled to acquire as aforesaid under the provisions of said acts or of any act or acts of the Legislature of the State of Texas in that behalf shall not be acquired, secured, and selected within a reasonable time after the execution of these presents, and said schedules and descriptions thereof shall not be prepared and delivered as aforesaid by the said party of the first part, then the same may be done by the parties of the second part in the same mode, but in the name of the said party of the first part, and recorded as aforesaid, and shall in like manner become a part of this indenture as though said description had been written in the body of this indenture, and shall be affixed to this instrument in the same manner and with the like effect as if done by the party of the first part; and to that end and purpose such trustees are hereby authorized and empowered to do all things requisite and necessary under the provisions of the said acts to entitle them to acquire, secure, and select such lands in the name of the said party of the first part.

And it is further agreed between the parties hereto that out of the proceeds of sales of the aforesaid lands the said party of the second part shall pay from time to time, as required by the said party of the first part, all necessary and proper expenses of the land department of the said party of the first part, as shown by accounts thereof, to be duly verified, including salaries, office expenses of land commissioners, expenses of appraising, surveying, and locating lands, taxes, stamps, and fees, expenses of advertising, printing, and stationery, and of foreign agents, commissions on sales made by agents, gratuities and allowances for improvements, and legal expenses; and

that said party of the second part shall retain to its own use, out of the proceeds of said sales, its own just allowances for services rendered and expenses incurred in the premises; and that the balance of the proceeds of sales of the aforesaid lands shall be appropriated to the purpose of the sinking fund hereinabove provided for the redemption of the bonds hereby secured, except as herein otherwise directed.

And it is further mutually agreed by and between the parties hereto that in the event of a conflict of claims to the title of any of the above-described lands on the part of pre-emptors or other claimants or of actual settlers thereon the said party of the first part and the said trustees shall have power to amicably compromise, settle, and adjust such claims on such terms as said trustees shall approve.

Article third. And the said The Texas and Pacific Railway Company, the party of the first part hereto, does hereby, for itself and its successors, covenant, promise, and agree to and with the said parties of the second part and the survivor of them and their and his successors and successor that the said party of the first part and its successors shall and will, at any time or times hereafter and from time to time, execute, acknowledge, and deliver under its corporate seal to the said parties of the second part and the survivor of them and their and his successors and successor all such further and other assurances, deeds, mortgages, obligations, transfers, indentures, and instruments in writing, and shall and will do all such further acts and things as shall or may be proper or necessary or as their or his counsel learned in the law shall deem necessary, proper, or expedient for the better and more effectual securing the payment of the series of bonds provided to be issued under and by virtue of these presents and the interest due or to grow due thereon and for carrying into effect the *interest*, design, object, and purpose of these presents or making, preserving, continuing, and keeping valid and effect-
57 ual the lien and incumbrance created or intended to be created by the execution, delivery, and recording of this indenture upon all the lands or real estate now owned, possessed, or acquired, or which shall hereafter be owned or acquired, by the said party of the first part and hereby granted and conveyed or purporting and intended so to be.

Article fourth. And it shall be the duty of any trustees or trustee who shall act as trustees or trustee under and by virtue of these presents, whether named in this instrument or who may be the successors or successor of those named herein, on or before the fifteenth day of December in each year to publish in one or more newspapers having general circulation in the cities of New York and Philadelphia, at their discretion, an advertisement setting forth the amount of said sinking fund then on hand and requesting the holders of said bonds to send written proposals to said trustees specifying the terms respectively for which they would be willing to sell bonds held by them, and said advertisement having been published for sixty days the trustees shall apply said amount to the purchase of such of said bonds as shall have been offered at or less than par, but if said bonds cannot be purchased at or less than par

by the said trustees then it shall be the duty of such trustees, without any reasonable delay, to designate by lot a number of bonds sufficient to equal as near as may be the accumulations of the said fund applicable thereto for redemption at the par value thereof, and after notice for sixty days, published in one or more newspapers in Philadelphia and New York, stating the numbers of the bonds so designated for redemption, interest on the said so designated bonds shall cease, and all moneys appertaining to said sinking fund, which shall come into the hands of the trustees from the sale of lands or otherwise, shall, for the time being and until the same can be applied to the purchase of said bonds or to their redemption by lot, be deposited in one or more of the trust companies in the cities of New York or Philadelphia upon the best terms which the said trustees, in their reasonable discretion, can obtain for the same; and if more of said bonds are offered at par or less than par than the amount of the sinking fund on hand then the trustees may select and pay by lot from those offered, after giving preference first to the lowest bidders.

And the trustees or trustee who shall act under and by virtue of these presents shall as often as once in each year during the continuance of their trusteeship, if required by the party of the first part, make and furnish to said party of the first part a detailed statement of the moneys and securities in their hands as such trustees and of such other matters connected with their said trusteeship as the said party of the first part may reasonably require.

Whenever the trustees shall receive any of the bonds above mentioned or the scrip issued for interest on said bonds in payment for land sold or mortgages held by them as such trustees, or by the purchase or redemption of such bonds as above provided, the same shall be immediately cancelled and shall thereafter only be held as vouchers by said trustees.

Article fifth. And it is further agreed and provided that if default shall be made in the principal sum or sums by virtue of the said bonds or any of them or any part thereof at maturity it shall be the duty of the trustees thereupon to proceed and sell such of the said lands hereby conveyed as shall then remain unsold, or so much thereof as may be necessary to raise sufficient moneys to pay off and fully satisfy and discharge all and singular the said bonds then outstanding, together with all costs, charges, and expenses of making such sales and of executing the trusts hereby created and in attending to the business thereof, and in such case the trustees
58 may, in their own discretion, sell such lands in parcels, at public or private sale, at such time or times and at such place or places and at such price or prices as they, the said trustees, in their discretion, may deem best for the interests of the said bondholders, and they shall have power, in their discretion, to hold auction sales for the purpose of selling said lands in portions from time to time, and the proceeds of all and singular of such sales, after deducting and paying all the expenses attending the same and for executing the trusts hereby created, shall be applied to the payment of such of said bonds as shall then be outstanding, but if the net

proceeds of such sale shall not be sufficient to pay off said bonds in full then the said proceeds shall be applied *pro rata*.

Article sixth. This indenture further witnesseth, and these presents are upon this express condition, that upon the payment in full of said bonds and interest due thereon then these presents and the estate hereby granted in respect to the said lands hereby granted and conveyed as shall not then have been sold and disposed of, at the time of the payment of all of said bonds and interest, shall cease and be void, and the said The Texas and Pacific Railway Company shall, in respect to said last-mentioned matters, be immediately reinvested in law and in fact with the said land unsold and the personal estate appertaining thereto, and shall be reinvested in law and in fact with all of such other lands and premises hereby granted and conveyed as shall not then have been sold or otherwise disposed of without any entry or other act whatever, and the said party of the first part covenants and agrees to cause this deed to be duly recorded in all proper places, and will satisfy, pay, and discharge all taxes, charges, liens, and other burdens which either exist or may hereafter be imposed or arise upon all or any part of the property hereby granted or conveyed or intended so to be, but all such payments and charges shall be reimbursed to the first party from the proceeds of lands sold as provided in article second, and the trustees assume no duty or responsibility on these subjects or in relation to any other matter except as herein expressly provided.

The said party of the first part hereby further covenants and agrees to and with the said party of the second part and the survivor of them and with their and his successors and successor that the party of the first part shall and will, from time to time and at all times hereafter, pay to the said party of the second part and the survivor of them and their and his successors and successor all costs, charges, and expenses that the trustees may sustain or be put to in the execution of the trusts hereby created; and, further, that the said party of the first part shall and will, from time to time and at all times hereafter, keep the said trustees fully indemnified and saved harmless against all such costs, charges, and expenses.

Article seventh. And it is further hereby provided and agreed that the said party of the second part and the survivor of them and their and his successors and successor shall be and are by these presents fully authorized and empowered to make and appoint, by and with the consent of the president of the party of the first part, all such agents and attorneys-in-fact and all such attorneys, counsellors, clerks, and other agents as they may think proper, and to invest them and each of them with such powers, general or special, as they may see fit to grant, and in the execution of the duties of the trusts conferred upon them by this indenture they may, at their discretion, proceed and act by such agent or agents, attorney or attorneys, in any and all cases where they may consider it expedient so to do, and all acts done by them, by or through any such agents or attorney, shall be, to all intents and purposes, as effectual,
59 valid, and binding as if done by the said parties of the second part or the survivor of them or their or his successors

or successor in person. And the said parties of the second part, or any person or persons acting as trustees or trustee under this indenture, shall not be answerable for the default or other misconduct of such agent or agents, attorney or attorneys in fact, attorneys or counsellors, clerks or other agents, unless chargeable with wilful negligence in their selection; and further, neither of the trustees shall be answerable or responsible in any way for the acts, omissions, or default of his associate trustee, nor shall either of the trustees be responsible for anything short of wilful default in the discharge of his duties. The trustees under this mortgage or deed of trust shall be and they are fully authorized and empowered, by and with the consent of the president of the party of the first part, by writing, under their hands and seals, to constitute and appoint a general attorney or agent, and to delegate to such general attorney or agent any and every power and authority by such trustees possessed, or capable of exercise by them, by virtue of the provisions of this instrument, and which shall be lawfully capable of delegation, and every act done by virtue of the delegated power by such general attorney or agent shall have like force and effect in every respect as if the same were done by said trustees themselves.

This trust shall extend to such bonds and such only as shall be countersigned by the trustee, and when all of said bonds shall be satisfied and discharged this trust shall cease. The trust shall also cease at the end of twenty-four calendar months after the principal moneys of said bonds shall fall due, as to all such bonds as shall not then have been presented for payment, and whenever said trust shall determine the trustees will reconvey to said party of the first part, its successors or assigns, all their rights, title, and interest of, in, and to all of said property which may not have been previously sold or otherwise disposed of.

In case of the death, incapacity to serve, or resignation of either trustee all of the estate and interest hereby created shall vest in the other trustee as fully as if he only had been named in and had executed this deed as the trustee.

No trustee shall resign his trusteeship herein without giving notice in writing of his intention so to do to the president or secretary of the said railway company thirty days prior to his resignation; and whenever it shall happen from any cause that there shall be only one trustee it shall be lawful for the said railway company or any of the bondholders to apply in writing to the Chief Justice or any associate justice of the Supreme Court of the United States to appoint another trustee to supply the vacancy, but until such vacancy shall be supplied as aforesaid all the powers, duties, and trusts which the said parties of the second part are by this indenture required or authorized to execute or discharge shall devolve upon and may be executed and discharged by the remaining trustee, and the said justice is hereby authorized, after giving notice of ten days to the remaining trustee, in writing, addressed to him through the post office, unofficially, and without legal proceedings, to appoint a suitable person, in his judgment, as trustee to fill such vacancy, and the person so appointed shall be and act as trustee, and, with the

remaining trustee, exercise all the powers and discharge all the trusts and duties which by this indenture belong to the parties of the second part as lawfully, fully, and effectually as if done by the said parties of the second part acting in person. And if it should so happen at any time that the trusteeship shall be entirely vacant and no trustee shall remain or survive then and in such case the said Chief Justice or associate justice, upon application in writing of the president of the company or any of the bond-
60 holders, may summarily and without legal proceedings appoint two, in his opinion, fit and suitable persons to fill said office of trustees; and the said two persons thus appointed shall be and act as trustees under this indenture, lawfully exercising all the powers and executing and discharging all the trusts and duties hereby belonging to the said parties of the second part.

And it is hereby further provided that if at any time only one trustee shall survive or remain, then and in such case he shall be, and is hereby, authorized, so long as he remains sole trustee, to exercise all the powers and exercise and discharge all the trusts and duties which by this indenture belong to the said parties of the second part as fully, effectually, and lawfully as both the said parties might or could do if personally acting.

In witness whereof the said party of the first part has hereunto affixed its corporate seal and has caused these presents to be attested by its president and secretary, in pursuance of a resolution of its board of directors, the day and year first above written.

[SEAL.] THOS. A. SCOTT, *President.*

Attest: C. E. SATTERLEE, *Secretary.*

Signed, sealed, and delivered in the presence of—
JNO. P. GREEN.
HENRY C. SPACKMAN.

We, William T. Walters and George D. Krumbhaar, the trustees named in the foregoing deed, accept the trust therein mentioned and agree to perform the same according to the best of our ability.

W. T. WALTERS,
GEO. D. KRUMBHAAR,
Trustees.

61 STATE OF PENNSYLVANIA, }
City and County of Philadelphia, } *ss:*

Be it remembered that on this twentieth day of September, A. D. one thousand eight hundred and seventy-five, before me, the subscriber, a notary public in and for the city of Philadelphia and State of Pennsylvania, personally appeared Thomas A. Scott, Esquire, president of the within-named corporation, the Texas and Pacific Railway Company, who, being duly sworn, deposes and says that he was personally present at the execution of the within indenture of mortgage and did affix the common or corporate seal of the said corporation, the Texas and Pacific Railway Company,

thereto; and that the seal so affixed is the common or corporate seal of the said The Texas and Pacific Railway Company, and that the foregoing indenture of mortgage was duly signed, sealed, and delivered by and as and for the act and deed of the said The Texas and Pacific Railway Company for the uses and purposes therein mentioned, and that the signature of this deponent to the said indenture of mortgage, as president of the said corporation, is of this deponent's own proper handwriting.

THOS. A. SCOTT.

Sworn and subscribed before me the day and year aforesaid.
[SEAL.] HENRY C. SPACKMAN,
Notary Public.

STATE OF PENNSYLVANIA, }
City and County of Philadelphia, } *ss:*

Be it remembered that on the twentieth day of September, A. D. one thousand eight hundred and seventy-five, before me, the subscriber, a notary public in and for the city of Philadelphia and State of Pennsylvania, personally appeared Charles E. Satterlee, who, being duly sworn according to law, deposes and says that he is the secretary of the Texas and Pacific Railway Company, the corporation named in the above and foregoing indenture of mortgage; that he was personally present at the execution of the said indenture of mortgage and saw the corporate seal of said company affixed thereto; that Thomas A. Scott, the president of the said company, did then sign, seal, and deliver the said indenture of mortgage as his act and deed and as the act and deed of said company, by virtue of the authority vested in him as such president to execute the same, August tenth, anno Domini one thousand eight hundred and seventy-
62 five, and desire that the said indenture of mortgage might be recorded as such act and deed; that the seal so affixed is the common or corporate seal of the said company; that he, the deponent, at the same time signed his name to the said indenture of mortgage as a subscribing witness thereto, and, as said secretary, in attestation of the due execution and delivery thereof, and that the names of the said president and of this deponent subscribed to the said indenture of mortgage as aforesaid are of their own proper and respective handwriting.

C. E. SATTERLEE.

Sworn and subscribed before me the day and year aforesaid.
[SEAL.] HENRY C. SPACKMAN,
Notary Public.

I have carefully examined the various acts of Congress and statutes of the State of Texas and other official documents referred to in the foregoing mortgage; also the trust deeds recited therein, and the proceedings of the stockholders and board of directors of the Texas and Pacific Railway Company authorizing the execution of the same, which were prepared by me, and I am satisfied that the recitals and

various provisions contained in the mortgage create a valid lien upon the property as therein stated and set forth, and are amply sufficient to subordinate the property therein described to the payment of principal and interest of the bonds authorized and to fully protect the rights of the bondholders.

THEO. CUYLER.

63 This indenture, made the twenty-third day of March, A. D. 1876, by and between the Texas and Pacific Railway Company, a corporation created by and existing under the laws of the United States, party of the first part, and William T. Walters and Geo. D. Krumbhaar, trustees, party of the second part—

Witnesseth: Whereas the stockholders of said company, duly convened in corporate meeting, on the twenty-ninth day of March, 1875, after authorizing and providing by their resolutions for the issuing of bonds and the protectiou of the same by mortgages or deeds of trust, said bonds being at the rate of twenty-five thousand (25,000) dollars per mile of completed road, the proceeds of the same to be applied to the completion and equipment of said five hundred and twenty-four (524) miles of railway and to the payment of the indebtedness of the company, did—

Resolve that the board of directors shall be, and they are hereby, requested and fully authorized and empowered to provide for and to issue eighty-nine hundred and eight (8,908) income and land-grant bonds, each for the sum of one thousand dollars, bearing seven per cent. interest, the interest and the principal of said bonds to be payable in United States currency, and said bonds to mature in forty years from their date, and to secure the payment of the interest and the principal of said bonds by a first mortgage upon all the lands heretofore granted to this company, or in which this company in said State is in any manner interested, being a first lien or charge upon all those sections or parts of sections or square miles of land acquired by the Texas and Pacific Railway Company, or to be acquired by said company in constructing its lines of road east of Fort Worth, under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and amendments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas, and applicable to said companies or either of them, or to the Texas and Pacific Railway Company, the total quantity of land so to be acquired in constructing said lines of railway being estimated at about 7,600,000 acres, and said mortgage or deed of trust shall also include the net income of the company from the operating of its lines east of Fort Worth, after providing for the operating expenses, the current repairs and reconstructions, and the interest on the first and second mortgages hereinbefore provided for, and there shall be included in said mortgage or deed of trust a provision for a sinking fund out of the net proceeds of sales of land, and by the receiving of said bonds in payment for purchases of lands covered by the mortgage. The bonds

thus provided for shall be exchangeable for outstanding land-grant bonds and used in purchase of material and supplies and for construction work, or may be applied toward the payment of any of the company's indebtedness or obligations.

The which mortgage or deed of trust for the protection of bonds, to be issued under its security and protection, was duly made and executed on the 15th day of May, 1875.

And whereas said mortgage or deed of trust describes, *inter alia*, a portion of the premises therein granted to said trustees, to be held in trust for the security and protection of the bondholders, in the words following:

64 Also all the net income of the lines of railway and appurtenances of the said The Texas and Pacific Railway Company east of Fort Worth, in the State of Texas, being five hundred and twenty-four miles of railroad, nearly completed, after deducting the expenses of operating and maintaining the same and the interest and other resources due by reason of previous circumstances thereon, the same being the Texas and Pacific Railway Company's lines of railway, constructed and to be constructed, from the State line between Louisiana and Texas, westward through Marshall and Dallas to Fort Worth, in the State of Texas, and from Texarkana, on the State line between Texas and Arkansas, to a point of junction via Clarksville, Paris, Bonham, and Sherman, with the line aforesaid, at or near Fort Worth, and from Marshall aforesaid through the town of Jefferson to a point of junction at or near Texarkana with the said line from Texarkana to Fort Worth, together with all the depots, depot grounds, locomotives, rolling-stock of every kind, and every appurtenance of every kind, real or personal, requisite or convenient for the use and operation of said lines of railway, including, also all the net income arising from the leasehold interest of said company in the line of railroad of the Vicksburg, Shreveport, and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas;

And whereas it was the design and intent of the parties that not only the net income so issuing out of and derived from said line of railway, but also the said line of railway and its appurtenances of all kinds, subject nevertheless to the prior mortgages thereon, should be granted and conveyed by way of trust as security for the payment of the interest and principal of the said bonds, as the same should come to be due, and it was so expressly agreed with the holders of the land-grant bonds issued under the land-grant mortgage heretofore created by the Texas and Pacific Railway Company, July 1st, 1872, the which bonds are agreed to be exchanged for bonds issued under the protection of the mortgage or deed of trust of May 15th, 1875;

And whereas said mortgage or deed of trust, while it includes the net income of said lines of railroad, does not expressly describe as including therein the said lines of railroad and appurtenances out of which said income issues and from which the same is derived,

and now by these presents it is designed and intended, in conformity with the design and intention and understanding and agreement of the parties, and also of the holders of the bonds issued under protection of the mortgage or deed of trust of July 1st, 1872, to cover and include the said lines of railway and appurtenances in the security held for the protection of the said holders of bonds issued under the protection of the mortgage or deed of trust of May 15th, 1875, and it is the design and intent of these presents to effectuate this purpose;

And whereas in the said indenture dated May 15, 1875, to which this is supplementary, a covenant for further assurance of title was contained, under which a request has been made for the execution of this supplementary instrument, which covenant is in the words following:

Article third. And the said The Texas and Pacific Railway Company, the party of the first part hereto, does hereby, for itself and its successors, covenant, promise, and agree to and with the said parties of the second part and the survivor of them and their
65. and his successors and successor that the said party of the first part and its successors shall and will, at any time or times hereafter and from time to time, execute, acknowledge, and deliver under its corporate seal to the said parties of the second part and the survivors of them and their and his successors and successor all such further and other assurances, deeds, mortgages, obligations, transfers, indentures, and instruments in writing, and shall and will do all such further acts and things as shall or may be proper or necessary or as their or his counsel learned in the law shall deem necessary, proper, or expedient for the better and more effectual securing the payment of the series of bonds provided to be issued under and by virtue of these presents and the interest due or to grow due thereon and for carrying into effect the *interest*, design, object, and purpose of these presents or making, preserving, continuing, and keeping valid and effectual the lien and incumbrance created or intended to be created by the execution, delivery, and recording of this indenture upon all lands or real estate now owned, possessed, or acquired, or which shall hereafter be owned or acquired, by the said party of the first part and hereby granted and conveyed or purporting and intended so to be.

And whereas at a meeting of the directors of the Texas and Pacific Railway Company it was resolved that the president or vice-president and secretary of this corporation be, and they are hereby, authorized and requested to affix the common and corporate seal of this company, and duly to attest the same, to a supplemental deed of trust or mortgage to the deed of trust or mortgage covering the land grant and net income of this company, dated May 15th, 1875, by which supplemental writing the lines of railway and appurtenances of this company subject to the lien of prior mortgages, amounting to $25,000 per mile upon the lines east of Fort Worth, are made part of the security of the holders of bonds issued under the protection of said deed of trust of May 15th, 1875, the which supplemental deed of trust or mortgage effectuates the original un-

derstanding and agreement of the parties as to the security to be given for the protection of said bonds; the which supplemental deed of trust or mortgage is in the words following:

Now this indenture witnesseth: That for and in consideration of the facts hereinbefore recited, and for the better security of the bonds issued under said deed of trust dated May 15th, 1875, and in fulfilment of the understanding and agreement under which said bonds were created, and in further consideration of the sum of one dollar by the party of the second part to the party of the first part in hand paid, the receipt whereof is acknowledged, the party of the first part hath granted, bargained, sold, conveyed, transferred, and set over, and by these presents doth grant, bargain, sell, convey, assign, transfer, and set over, unto the said party of the second part, the lines of railway and appurtenances of the said Texas and Pacific Railway Company east of Fort Worth, in the State of Texas, being five hundred and twenty-four miles of railroad nearly completed, after deducting the expenses of operating and maintaining the same and the interest and other resources due by reason of previous circumstances thereon, the same being the Texas and Pacific Railway Company's lines of railway, constructed and to be constructed, from the State line between Louisiana and Texas westward through Marshall and Dallas to Fort Worth, in the State of Texas, and from Texarkana, on the State line between Texas and Arkansas, to a
66 point of junction via Clarksville, Paris, Bonham, and Sherman with the line aforesaid at or near Fort Worth, and from Marshall aforesaid through the town of Jefferson to a point of junction at or near Texarkana with the said line from Texarkana to Fort Worth, together with all the depots, depot grounds, locomotives, rolling-stock of every kind, and every appurtenance of every kind, real or personal, requisite or convenient for the use and operation of said lines of railway; including, also, all the net income arising from the leasehold interest of said company in the line of railroad of the Vicksburg, Shreveport and Texas Railroad Company, extending from Shreveport, in the State of Louisiana, to a connection with the line of railroad of the Texas and Pacific Railway Company at the State line between Louisiana and Texas, under and subject, nevertheless, to the lien and charge of prior encumbrances thereon, and subject to all the trusts, limitations, conditions, and provisions of every kind mentioned and set forth in the deed of trust dated May 15th, 1875, whereto this instrument of writing is supplementary.

In witness whereof the said The Texas and Pacific Railway Company, party of the first part, has hereto affixed its common and corporate seal, and has caused the same to be attested by its president and secretary, in pursuance of a resolution of its board of directors, the day and year first above written.

THOMAS A. SCOTT, *President.*

Attest:
[SEAL.] C. E. SATTERLEE, *Secretary.*

Signed, sealed, and delivered in the presence of—
C. P. MACKIE.
HENRY C. SPACKMAN.

We, William T. Walters and George D. Krumbhaar, the trustees named in the foregoing deed, accept the trust therein mentioned and agree to perform the same according to the best of our ability.

W. T. WALTERS,
GEO. D. KRUMBHAAR,
Trustees.

67 STATE OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

Be it remembered that on this twenty-third day of March, A. D. one thousand eight hundred and seventy-six, before me, the subscriber, a notary public in and for the city of Philadelphia and State of Pennsylvania, personally appeared Thomas A. Scott, Esquire, president of the within-named corporation, The Texas and Pacific Railway Company, who, being duly sworn, deposes and says that he was personally present at the execution of the within indenture of mortgage and did affix the common or corporate seal of the said corporation, The Texas and Pacific Railway Company, thereto, and that the seal so affixed is the common or corporate seal of the said The Texas and Pacific Railway Company, and that the foregoing indenture of mortgage was duly signed, sealed, and delivered by and as and for the act and deed of the said The Texas and Pacific Railway Company for the uses and purposes therein mentioned, and that the signature of this deponent to the said indenture of mortgage as president of the said corporation is of this deponent's own proper handwriting.

THOMAS A. SCOTT.

Sworn and subscribed before me the day and year aforesaid.
[SEAL.] HENRY C. SPACKMAN,
Notary Public.

STATE OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

Be it remembered that on the twenty-third day of March, A. D. one thousand eight hundred and seventy-six, before me, the subscriber, a notary public in and for the city of Philadelphia and State of Pennsylvania, personally appeared Charles E. Satterlee, who, being duly sworn according to law, deposes and says that he is the secretary of the Texas and Pacific Railway Company, the corporation named in the above and foregoing indenture of mortgage; that he was personally present at the execution of the said indenture of mortgage and saw the corporate seal of said company affixed thereto; that Thomas A. Scott, the president of the said company, did then sign, seal, and deliver the said indenture of mortgage as his act and deed and as the act and deed of said company by virtue of the authority vested in him as such president to execute the same ——, anno Domini one thousand eight hundred and seventy-

six, and desires that the said indenture of mortgage might be
68 recorded as such act and deed; that the seal so affixed is the common or corporate seal of the said company; that he, the deponent, at the same time signed his name to the said indenture of mortgage as a subscribing witness thereto and as said secretary in attestation of the due execution and delivery thereof, and that the names of the said president and of this deponent subscribed to the said indenture of mortgage as aforesaid are of their own proper and respective handwriting.

C. E. SATTERLEE.

Sworn and subscribed before me the day and year aforesaid.
[SEAL.] HENRY C. SPACKMAN,
Notary Public.

69 *Amended Answer.*

United States Circuit Court, Southern District of New York.

HENRY S. MARLOR
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Dillon & Swayne, attorneys for defendant, 195 Broadway, New York.

U. S. circuit court. Filed Ap'l 15, 1884.
TIMOTHY GRIFFITH, *Clerk.*

Due and timely service of a copy of the within answer is hereby admitted. Service herewith of copies of bond & mortgage referred to herein is hereby waived.
Dated Ap'l 15, 1884.

DOS PASSOS BROS.,
Att'ys for Pl'ff.

70 *Amended Answer.*

United States Circuit Court, Southern District of New York.

HENRY S. MARLOR
against
THE TEXAS AND PACIFIC RAILWAY COMPANY.

The defendant, by Dillon and Swayne, its attorneys, answering the complaint herein—

I.

First. Admits that it was duly incorporated under and by virtue of the acts of Congress of the United States of America.

Second. It admits that on or about the 29th day of March, 1875, the stockholders of defendant company, under and by virtue of its corporate powers and privileges, duly convened in corporate meeting, adopted, among others, a resolution authorizing the issue of

eighty-nine hundred and eight income and land-grant bonds, but it alleges that only a part of said resolution is set forth in the second paragraph of the complaint, and that the full text of said resolution is as appears in paragraph first of part II of this answer.

Third. It admits that, in pursuance of said resolution of
71 defendant's stockholders and in pursuance of the authority conferred by its charter and of the several acts of Congress of the United States of America under which defendant was incorporated, the said defendant caused to be made, executed, and issued eight thousand eight hundred and fifty-seven (of a total authorized issue of eight thousand nine hundred and eight) bonds, styled income and land-grant bonds, each of the general form and tenor as set forth in the copy of one of said bonds incorporated in the third article of the complaint. It admits that said bonds were duly signed by the president and secretary of defendant company and were duly sealed with its seal, but it denies that said bonds were executed and issued on or about the 15th day of May, 1875, and alleges the fact to be that said bonds were executed at various dates thereafter and were issued in sections or installments on several dates subsequent to said 15th of May, 1875, viz., a part as of January 1, 1876; a part as of July 1st, 1876, and a part as of July 1st, 1877.

Fourth. It denies any knowledge or information sufficient to form a belief as to the purchase by the plaintiff at any place or at any time of any of said income and land-grant bonds, and it denies any knowledge or information sufficient to form a belief as to the ownership by plaintiff at any time of any of said bonds in excess of 110 thereof. It alleges that all of said income and land-grant bonds are "registered" obligations, payable to a payee therein named or his assigns and not to bearer, and that frequently the registered holders of said bonds are not the actual holders or owners thereof. It further alleges that said 110 bonds, being the maximum number held by plaintiff at any time or times within the knowledge of defendant company as derived from or shown by its registry of said bonds, were registered in the name of plaintiff in the amounts and of the dates as follows, viz: 50 of said bonds were registered
72 on the 1st day of May, 1881; 20 thereof on the 27th day of April, 1883, and 40 thereof on the 16th day of October, 1883. It alleges that the aggregate of the amounts thus registered, viz., 110 of said bonds, constituted the full amount of plaintiff's registered holdings at the time of the commencement of this action or at any time prior thereto. It denies any knowledge or information sufficient to form a belief as to whether plaintiff was, at the time of the commencement of this action, the actual holder or owner of any of defendant's said bonds.

Defendant denies each and every allegation in the fourth paragraph of the complaint contained except as hereinbefore specifically admitted or denied.

Fifth. Defendant denies that it failed and neglected to exercise the option given to it in and by the terms of said bonds to pay the plaintiff interest in scrip upon 150 income and land-grant bonds, as alleged in the fifth paragraph of said complaint.

Defendant saith that it cannot be ascertained until a reasonable time after the last day of June in each year what the net earnings, as defined in the said bonds and the mortgage securing the same, for the preceding year have been. It alleges that said option to pay in scrip was exercised, although the resolutions of the executive committee of defendant company directing such payment in scrip were not passed on the first days of July in the years 1882 and 1883, respectively. It denies each and every allegation of the fifth article of the complaint not hereinbefore specifically admitted or denied.

Sixth. Defendant denies any knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff has duly demanded the payment of the interest alleged to have become due as aforesaid on plaintiff's said bonds on the first days of July in the years 1882 and 1883. It alleges that diligent search of its records and inquiries of its proper officers have been made,
73 and that no record of such due demand appears, nor have its said officers any knowledge or information thereof. Wherefor defendant denies that such demand was made.

It denies that it has refused and neglected to pay said interest in the manner provided in its said bonds, and alleges that the plaintiff was notified that the defendant was ready to issue scrip, and scrip, according to the terms of said bonds, was offered to be delivered to plaintiff in respect of any and all bonds held by him prior to any demand as aforesaid of plaintiff for interest or scrip and prior to the institution of this suit. It denies each and every allegation contained in the sixth article of the complaint and not hereinbefore specifically admitted or denied.

II.

And for other and further defense defendant alleges—

First. That on the 29th day of March, 1875, defendant had outstanding bonds and mortgages securing the same as follows:

9,252 land-grant bonds, secured by a first mortgage upon all the lands in the State of Texas which the company had acquired or might thereafter acquire by virtue of its consolidation with the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company, or by virtue of its consolidation with or purchase of any other railroad company in the State of Texas under the authority of the acts of Congress of March 3d, 1871, and May 2d, 1872.

74 Defendant further alleges that both the construction bonds and the land-grant bonds last above described were fixed obligations of defendant company, whereon the obligation to pay maturing semi-annual interest coupons was absolute and without condition or qualification; that the mortgages securing said bonds contained provisions for foreclosure in case of default in the payment of current interest, the provision to this effect in the mortgage securing said land grant bonds being in the following terms:

"And if default shall be made in the payment of the interest which shall accrue or become due upon the said bonds or any of them for the space of sixty days, when the same shall become due,

the said trustees and the survivors of them and the successors and successor of such survivors may thereupon sell at public or private sale for the best price which can be obtained for the same all or any part of said lands which shall then remain unsold sufficient to pay the interest then remaining due upon any of said bonds which shall then be outstanding and unpaid, and such trustees may appoint one or more agents or attorneys to make sales, execute conveyances, and receive the purchase-money and pay the said interest then remaining unpaid on said bonds or any of them or apply the same *pro rata* if not sufficient to pay said interest in full."

Defendant prays that upon the trial of this cause it may have leave to refer the court to said construction and land-grant bonds and to the mortgages securing the same as parts of this answer.

Defendant further alleges that on said 29th day of March, 1875, defendant's road was only partially completed to Fort Worth, in the State of Texas, there being then built and in operation about 325 miles thereof; that defendant was unable to meet the interest on said bonds and was in default therefor; that on said day the stockholders of defendant company met to consider and retrieve
75 the financial situation of the defendant, to readjust and reorganize its debt, to provide against recurring defaults which endangered foreclosure, and to provide means for completing its road to Fort Worth, and at said stockholders' meeting, held as aforesaid on the 29th day of March, 1875, did resolve as follows:

76 "(*c*) Resolved, That the board of directors shall be, and they are hereby, requested and fully authorized and empowered to provide for and to issue eighty-nine hundred and eight (8,908) income and land-grant bonds, each for the sum of one thousand dollars, bearing seven per cent. interest, the interest and the principal of said bonds to be payable in United States currency and said bonds to mature in forty years from their date and to secure the payment of the interest and the principal of said bonds by a first mortgage upon all the lands heretofore granted to this company or in which this company in said State is in any manner interested, being a first lien or charge upon all those sections or parts of sections or square miles of land acquired by the Texas & Pacific Railroad Company, or to be acquired by said company, in constructing its lines of road east of Fort Worth under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railway Company, the Memphis, El Paso and Pacific Rail-
77 road Company, or of the several supplements and amendments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas and applicable to said companies or either of them or to the Texas and Pacific Railway Company, the total quantity of land so to be acquired in constructing said lines of railway being estimated at about 7,600,000 acres; and said mortgage or deed of trust shall also include the net income of the company from the operating of its lines east of Fort Worth, after providing for the operating expenses, the current repairs and reconstructions, and the interest on the first and second

mortgages hereinbefore provided for; and there shall be included in said mortgage or deed of trust a provision for a sinking fund out of the net proceeds of sales of land and by the receiving of said bonds in payment for purchases of lands covered by the mortgage. The bonds thus provided for shall be exchangeable for outstanding land-grant bonds and used in purchase of material and supplies and for construction work, or may be applied toward the payment of any of the company's indebtedness or obligations."

Defendant states that in pursuance of the authority conferred in and by the aforesaid resolutions the board of directors of defendant company caused to be made, executed, and issued—

(c) 8,857 income and land-grant bonds, secured by mortgage executed as prescribed in said resolutions; a copy of one which said bonds and of the mortgage securing said bonds are annexed hereto, made parts hereof, and marked Exhibits "A" and "B," respectively.

78 Second. Defendant further alleges that subsequently to the first day of January, 1876 (as of which date the first installment of said income and land-grant bonds was issued as aforesaid), and in the years or interest periods ending, respectively, on the first days of July, 1877, 1878, and 1879, the net earnings of defendant company as defined in said bonds and in the mortgage referred to in said bonds were insufficient to enable it to pay the interest on its said income and land-grant bonds then outstanding at the various dates aforesaid; that during and throughout said years or interest periods no interest was paid upon said bonds, nor was any scrip issued for such interest or for any portion thereof; that on the 16th day of February, 1880, in compliance with the solicitations of certain of the holders of said bonds and in pursuance of a resolution of its board of directors, defendant issued scrip for the interest accumulated during the entire period included between the said first day of January, 1876, and the first day of July, 1879, as appears upon the face of said scrip; that the net earnings of defendant's road having been so insufficient to enable it to pay the interest on said bonds for the years ending July 1st, 1880, and July 1st, 1881, defendant issued scrip for the interest for such years, respectively.

79 Third. Defendant further alleges that official returns recently received and now on file at the office of defendant company in the city of New York from the auditor of said company show, and defendant upon information and belief therefore avers the fact to be, that for the year ending July 1st, 1882, there was a deficit of $195,076.17 in the earning- of its said road, and that for the year ending July 1st, 1883, there were surplus earnings of $131,867.90, thus showing a net deficit for the operations of said two years of $63,208.27; that the fact that the net earnings of said two years were insufficient to enable defendant company to pay the interest on said income and land-grant bonds, as provided therein, was promptly made known and declared by defendant company to its bondholders, and that the plaintiff had due notice thereof. Defendant, on information and belief, states that before any

80 demand was made by the plaintiff as aforesaid in respect to

the bonds in suit for the payment of interest this defendant exercised, by due corporate resolution, the option to issue scrip for said interest, as provided in said bonds and mortgage, and that the plaintiff had notice of such action; that defendant notified the plaintiff that it was ready and willing to issue such scrip to him, and it states that it is still so ready and willing, and it now offers to issue and deliver to the plaintiff such scrip in respect of all bonds owned by him on the production thereof, and it offers to bring said scrip into court for the said plaintiff.

That since such exercise by defendant of its option to issue scrip as aforesaid it has issued and delivered to bondholders requesting the same said scrip in large amounts, viz., about $450,000, at the date of the filing hereof, and is now constantly issuing and delivering such scrip to the holders of its said income and land-grant bonds on their demand or request therefor.

The defendant alleges said income and land-grant bonds have at all times since their first issue been worth much less than the said first-mortgage bonds and said consolidated mortgage bonds and worth less than par and the scrip much less than the income and land-grant bonds; that at the date of the filing of this answer the market value of said income and land-grant bonds is about 50 per cent. and of said scrip about 42 per cent.

Fourth. Defendant further alleges that its said income and land-grant bonds are, as aforesaid, registered obligations; that interest thereupon is payable only to registered holders thereof or to their assignees by duly executed and acknowledged or authenticated order or assignment at the office of defendant company and upon the delivery by such registered holders or their assignees by duly executed and authenticated order or assignment of receipts
81 for such interest, or, in case scrip is issued, of receipts for such scrip; that by uniform and invariable practice from the first issue of scrip for said bonds such bonds or such authenticated orders or assignments thereof are presented by the payee or registered holder or such assignee at the office of the defendant for scrip; that when scrip is delivered thereon no indorsement is made upon the bond, but the receipt or voucher for such scrip so issued and received is signed by the person receiving the same, and the defendant cannot know to whom to issue or deliver scrip or who is entitled thereto or who will receive the same until the said bonds or such assignments or orders are presented at its office as aforesaid and scrip demanded thereon, or unless the register- holder, properly identified, presents himself at the office of the company and demands the issue of the scrip; and the defendant says, on information and belief (as in paragraph sixth, part I, hereof), that the said plaintiff, in respect of the said interest sued for herein, never presented the said bonds and demanded or requested the issue of scrip for the years 1882 and 1883, but the defendant says that it has offered to deliver and is now ready to deliver scrip to the plaintiff for and in respect of the said bonds in suit for the years 1882 and 1883 on the production of said bonds and the execution of the proper voucher or receipt for such scrip.

Wherefore defendant demands judgment against the plaintiff that the complaint herein be dismissed with costs.

DILLON & SWAYNE,
Attorneys for Defendant.

82 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Jay Gould, being duly sworn, says that he is the president of the Texas and Pacific Railway Company, the defendant in the above-entitled cause; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JAY GOULD.

Sworn to before me this 15th day of April, 1884.

WM. J. HARDING,
Notary Public, Kings County, New York.

Certificate filed in New York county.

83 NOTE.—A copy of the bond and of the mortgage referred to in the within amended answer were filed with the original answer herein and are now on file in the office of the clerk of this court.

84 U. S. Circuit Court, Southern District of New York.

HENRY S. MARLOR
v.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

It is hereby consented that the answer of the defendant be amended as set forth in the within paper of amendment.

And it is further consented that on the filing of this consent the said answer be regarded as amended, and with the same effect in all respects as if the amendment herein referred to had formed a part of the original answer herein.

Dated New York, March 29, 1884.

DOS PASSOS BROTHERS,
Attorneys for Plaintiff.

85 U. S. Circuit Court, Southern District of New York.

HENRY S. MARLOR
v.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Now comes the defendant and amends its answer in the above-entitled cause as follows:

By striking out of said answer the following allegations, contained in part II thereof, at paragraph fourth, folio 56: "Defendant further alleges that there were no net earnings upon its said road, as net earnings are described in said income and land-grant bonds and in the mortgage referred to in the said bonds, for the year ending July 1st, 1882, and for the year ending July 1st, 1883, and that this fact was promptly published and declared by defendant company to the

public and to its bondholders, and that the plaintiff has had due notice thereof," and substituting therefor the following allegations:

"Defendant further alleges that official returns recently received, and now on file at the office of defendant company in the city of New York, from the auditor of said company show, and defendant, upon information and belief, therefore avers the fact to be,
86 that for the year ending July 1st, 1882, there was a deficit of $195,076.17 in the earnings of its said road, and that for the year ending July 1st, 1883, there were surplus earnings of $131,867.90, thus showing a net deficit for the operations of said two years of $63,208.27; that the fact that the net earnings of said two years were insufficient to enable the defendant company to pay the interest on said income and land-grant bonds as provided therein was promptly made known and declared by defendant company to its bondholders, and that the plaintiff had due notice thereof.

DILLON & SWAYNE,
Attorneys for Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

C. E. Satterlee, being duly sworn, says that he is the secretary and treasurer of the Texas and Pacific Railway Company, the defendant in the above-entitled cause; that he has read the foregoing amendment to defendant's answer therein and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

C. E. SATTERLEE.

Sworn to before me this 29th day of March, 1884.

WM. J. HARDING,
Notary Public, Kings County, New York.

Certificate filed in New York county.

87 (Endorsed:) U. S. circuit court. Henry S. Marlor, plaintiff, against The Texas and Pacific Railway Company, defendant. Consent and amendments of answer. Dillon & Swayne, 195 Broadway, New York, attorneys for defendant. U. S. circuit court. Filed Apr. 2, 1884. Timothy Griffith, clerk.

88 United States Circuit Court, Southern District of New York.

HENRY S. MARLOR, Pl'ff,
ag'st
THE TEXAS AND PACIFIC RAILWAY COMPANY, Def't.

The parties to this cause hereby waive the trial by jury, and agree to submit the case to the court under and pursuant to the statute in such case made and provided.

Dated Syracuse, July 10, 1884.

DOS PASSOS BROTHERS,
Att'ys for Pl'ff.
DILLON & SWAYNE,
Att'ys for the Defendant.

(Endorsed:) U. S. circuit court, southern district of New York. Marlor *vs.* Texas & Pacific R. R. Co. Stipulation waiving trial by jury. U. S. circuit court. Filed Aug. 27, 1884. Timothy Griffith, clerk.

89 *Statement of Agreed Facts.*

United States Circuit Court, Southern District of New York.

HENRY S. MARLOR, Plaintiff,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

It is hereby stipulated by the parties to this action that the following facts are, for the purposes of this suit, admitted to be true, and no evidence need be given in relation thereto; each party reserves all objections to the relevancy and competency of the facts; each party is at liberty to take further evidence:

First. On the 8th day of October, 1883, John R. Dos Passos, the counsel for the plaintiff herein, addressed to Jay Gould, the president of the defendant railway company, the following letter:

"N. Y., *Oct.* 8, 1883.

DEAR SIR: I have been consulted by several holders of the land-grant bonds of the Texas and Pacific R. R. Co. respecting
90 their rights under these bonds and accompanying mortgage. Before actively proceeding in the matter I should like to confer with you on the subject. Will you kindly state where I can see you to-day.

I am, y'rs very truly,

JNO. R. DOS PASSOS.

Jay Gould, Esq."

On the 10th of October, 1883, the following letter was sent to the plaintiff's attorney herein from Dillon & Swayne, of which the following is a copy:

"John F. Dillon. Wager Swayne.

Dillon & Swayne, attorneys and counsellors at law, 195 Broadway, Western Union building.

NEW YORK, *October 10th*, 1883.

Messrs. Dos Passos Bros., attorneys-at-law, 29 Wall St., city.

GENTLEMEN: We will be glad to see you at your convenience in respect of the matter mentioned in your note of October 8th to Mr. Gould relating to the land-grant bonds of the Texas and Pacific Railroad Company.

Very truly yours, DILLON & SWAYNE."

On the 12th of October, in response to this letter, John R. Dos Passos, the counsel for the plaintiff, visited the offices of Dillon & Swayne, 4th floor, at No. 195 Broadway, in the city of New
91 York, in which building, on the 2nd floor, the offices of the defendant, The Texas and Pacific Railway Company, were

also located, and informed John F. Dillon, one of the attorneys for the defendant, that he came to see him in response to his letter; that the said John R. Dos Passos stated that he represented holders of the Texas and Pacific land-grant and income bonds to the amount of about two million dollars, but did not name any of the holders thereof; that he had been engaged for a long time in examining the Texas and Pacific land grant bonds and the mortgages securing the same and had given an opinion that owing to the refusal of the defendant company to exercise its option to pay the scrip on the first days of July, 1882, and 1883, to the holders of said bonds that the said company had become liable to pay the same in cash, and that the holders of the said bonds had employed the said John R. Dos Passos to collect the interest in cash from the company, and that he called in response to the note of said Dillon to ascertain whether the company would pay the said interest in cash; if not to all the holders of the bonds, to those persons whom the said Dos Passos represented; that said Dos Passos further informed the said Dillon that he was not interested or employed for the remaining holders of said bonds beyond two millions, and that all he desired was to obtain the cash for his own immediate clients. The said Dillon replied that he was not authorized to speak for the company in respect to Mr. Dos Passos' position and claim, but he would ascertain from the company its position in respect
92 to the interest in question and give Mr. Dos Passos early information thereof, to which course Mr. Dos Passos assented; that he would like to hear the theory upon which the bondholders sought to recover cash, and that he would consult with Mr. Gould and let the said Dos Passos know the result within a few days; that said Dillon then inquired if the bondholders would accept scrip, to which the said Dos Passos responded that they would not, so far as his immediate clients were concerned, and that he was interested in any one else; that afterwards in the course of the conversation the said Dos Passos referred to the language of the bond and gave a general view of his position; that the interview then terminated; that on the same day and within two or three hours after the last-named interview the said Dos Passos received a letter from Dillon & Swayne, a copy of which is as follows:

"John F. Dillon. Wager Swayne.

Dillon & Swayne, attorneys and counsellors at law, 195 Broadway, Western Union building.

NEW YORK, *October* 12, 1883.

John R. Dos Passos, Esq., attorney-at-law, 29 Wall St., city.

DEAR SIR: Recurring to the subject of our interview this morning in respect of the interest on the Texas and Pacific income and
93 land-grant mortgage, payable July 1st, 1882, and July 1st, 1883, in which we promised to give you early notice of the company's position in the premises, we are instructed to say that the company, by resolution duly adopted, has exercised its option

to pay the said interest in scrip as provided in the mortgage. The company is ready to deliver to you or to your clients scrip in accordance with the provisions of the mortgage. Hoping this will be satisfactory, we are,

Very truly yours,

DILLON & SWAYNE,
Attorneys for the Texas and Pacific Railway Company."

That on the next day, to wit, on the 13th day of October, 1883, the following notice appeared in the New York World, a newspaper published in the city of New York:

Notice.

"OFFICE OF THE TEXAS AND PACIFIC RAILWAY COMPANY, 197 BROADWAY, NEW YORK CITY.

Notice is hereby given that the Texas and Pacific Railway Company has exercised the option given by the income and land-grant mortgage of May 15, 1875, to pay in scrip as therein provided the interest on the bonds secured by the said mortgage which fell due July 1st, 1882, and July 1st, 1883. Books for the registration of these bonds will be closed from October 20 to November 15, 1883, inclusive.

C. E. SATTERLEE, *Treasurer.*"

94 That on or about October 19th, 1883, Mr. John R. Dos Passos called at the office of Dillon & Swayne and suggested to John F. Dillon a basis of settlement other than in scrip, which he said his clients would not take; that said Dillon replied, in substance, that he had no authority to act, but would submit the proposition to the company's officers. That on the following day, October 20th, 1883, a letter, of which the following is a copy, was sent to and received by said John R. Dos Passos:

"NEW YORK, *October 20th*, 1883.

John R. Dos Passos, Esq., 3 Broad St., city.

MY DEAR SIR: Adverting to your inquiry and suggestion on yesterday, we are instructed to say that the company has made its election to pay in scrip, which it is ready to do, and that any proposition to pay all or any part of the bondholders otherwise cannot be entertained.

Very respectfully yours,

DILLON & SWAYNE,
Atty's for the Texas and Pacific R'y Co.

That subsequently this suit was begun by the plaintiff in the supreme court of New York, and it was afterwards removed to this court upon petition of defendant.

Second. That on the 18th day of December, 1882, a committee of the New York Stock Exchange forwarded a letter to the Texas and Pacific Railway Company, of which the following is a copy:

95 "As sundry questions in regard to the Texas and Pacific income

and land-grant bonds have been submitted to this committee by holders of the bonds, and as the committee have not this information on hand, they would request you to inform this committee—

1. The present outstanding amount of Texas Pacific income and land-grant bonds.

2. The amount in acres of land actually secured to these bonds originally.

3. The amount in acres of land now remaining secured to these bonds.

4. The amount of bonds cancelled to date.

5. The amount received in cash or on credit for lands secured to this mortgage, and what disposition has been made of cash or notes.

6. Or has any provision been made for the payment of the last interest, due July 1, 1882."

To which letter the said company, defendant, made a reply, of which the following is a copy:

"TEXAS PACIFIC RAILROAD COMPANY,
197 BROADWAY, NEW YORK, *Dec.* 23, 1882.

S. T. Russell, Esq., Chairman Com. on Stock List, N. Y. Stock Exchange.

96 D'R SIR: In reply to your communication of the 18th inst., relative to the income and land-grant bonds of this Co., I beg to state as follows:

Income & land-grant bonds, total issue		8,908,000
Rec. in payment for land & cancelled		216,000
Balance		8,692,000
Actually outstanding	8,568,000	
Held for redemption of 62,000 old land-grant bonds and fractional scrip	124,000	
		8,692,000
Of the lands earned and covered by the income and land-grant mortgage there has been received up to date, acres		5,356,342
Less am't transferred to the Fidelity Trust Ins. & S. D. Co. of Phil'd. in trust	640,000	
Lands sold to Dec. 1, '82	187,220	
		827,220
Balance unsold Dec. 1, 1882		4,529,122
Total am't of sales to Dec. 1, 1882		358,387
Paid as follows:		
In bonds for cancellation	216,000	
In interest scrip	20,885	
In accrued int. on bonds and scrip	34,380	
In cash and notes (estimated)	87,122	
		358,387

97 On Dec. 1, 1882, the expenses of the land department paid by the Texas & Pac. R. R. Co. amounted to (estimated) $250,000, against which the receipt of cash and notes are charged in liquidation.

In answer to your sixth interrogatory I have to say that no action has been taken by our company in regard to the interest maturing July 1, 1882.

Yours, truly,

(Signed) C. E. SATTERLEE,
Sec'y & Treas."

Third. That previous to the first day of July, 1882, the plaintiff herein purchased at the New York Stock Exchange, in the city of New York, and then and there became and now is the lawful owner and holder of one hundred and fifty (150) of the aforesaid land-grant and income bonds of the defendant; that one hundred and ten (110) of said bonds were registered upon the books of the company in the name of the plaintiff, and were so registered previous to the eleventh day of October, 1883, and that the plaintiff has become (by assignment from the parties in whose name the bonds were registered, according to the rules and usages of the New York Stock Exchange) entitled to the interest due upon the remaining forty (40) bonds of which he was and is the owner.

98 Fourth. That according to the rules and usages of the New York Stock Exchange and the usages of railroads and other corporations paying interest, dividends, or scrip upon stock or registered obligations in the city of New York, it is the practice to advertise in two or more daily newspapers the time and place when and where said interest, dividends, or scrip will be paid, and to further notify the parties in interest, through the medium of said newspapers, that the books of the corporation will close at a given period in order to enable all persons interested to transfer their stock or register their bonds, and that it is the uniform usage to pay interest, dividends, or scrip upon stock or registered obligations to the person in whose name such stock or bonds stand on the books of the company at the date when the same are closed or to parties holding due-bills, assignments, or notes from such registered stockholders or bondholders.

Fifth. That on the first day of July, 1882, the average market price of the stock of the Texas and Pacific Railway Company, defendant, was 41¼; that on the first day of July, 1883, the market price of said stock was 37¼, and that on the twelfth day of October, 1883, the average price of said stock was 22; that on the first day of July, 1882, the average market price of the scrip of the defendant company issued for interest on its said income and land-grant bonds shall for the purposes of this suit be taken to have been 45

99 to 50 per cent. of par value, and the average price of said scrip on the first day of July, 1883, shall be so taken to have been 53 per cent., and that the average market price of said scrip on the 12th day of October, 1883, was 52 per cent., and that the market value of income and land-grant bonds on July 1, 1882, was

63½ per cent., and on July 1, 1883, was 62¾ per cent., and that on the 17th day of November, 1883, the date of the commencement of this action, the market price thereof was 49½ per cent.

The plaintiff also admits that the following parts of the defendant's amended answer are true:

Commencing at folio 15 down to and including folio 20; also from and including folio 31 down to folio 35, and in folio 35 from the words "defendant states" down to the words "executed and issued;" also in folio 36, beginning at the figures 8,857 down to and including the word "respectively;" also paragraph second of said amended answer, between folios 53 and 56, inclusive, with the exception of the words "in compliance with the solicitations of certain holders of said bonds;" also the third paragraph of said answer (written), commencing with the words "defendant further alleges, etc.," and ending with the words "notice thereof;" and also paragraph fourth of said amended answer, between folios 60 and 63, inclusive, down to words "such scrip."

JOHN R. DOS PASSOS,
Attorney for Plaintiff.
DILLON & SWAYNE,
Attorneys for Defendant.

100 (Endorsed:) U. S. circuit court, southern district of New York. Henry S. Marlor, plaintiff, against The Texas and Pacific Railway Company, defendant. Original. Statement of agreed facts. U. S. circuit court. Filed Aug. 27, 1884. Timothy Griffith, clerk.

101 United States Circuit Court, Southern District of New York.

HENRY S. MARLOR

vs.

THE TEXAS & PACIFIC R. R. Co.

WALLACE, *J.:*

This case has been tried before the court without a jury. The plaintiff is the owner of 150 bonds of the defendant for $1,000 each, and sues to recover two installments of interest thereon — one of $10,500, payable July 1st, 1882, and one of $10,500, payable July 1st 1883. The bonds are part of an issue of 8,857 bonds created by the defendant in 1875, and known as "income and land-grant bonds." They are secured by a mortgage which is a first lien on 7,600,000 acres of land of the defendant, and also upon the net income arising from operating defendant's lines of railroad east of Fort Worth, after paying interest on prior mortgages thereon.

By the terms of the bond the defendant acknowledges itself to be indebted to the holder in the sum of $1,000, "which sum the company promises to pay to — or assigns at the office of the company in the city of New York on the 1st day of January, 1915, with
102 interest thereon, at the rate of 7 per cent. per annum, payable annually on the 1st day of July of each year, as provided in the mortgage hereinafter mentioned." After reciting that the payment

of the bond is secured by a first mortgage of even date therewith upon the lands of the company, and also upon the net income of the company derived from operating its railway east of Fort Worth, the bond contains the following condition: "In case such net earnings shall not in any one year be sufficient to enable the company to pay 7 per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest, such scrip to be received at par and interest the same as money in payment for any of the company's lands at the ordinary schedule price, or it may be converted into capital stock of the company when presented in amounts of $100, or its multiple." The mortgage is silent respecting payment of interest or principle except that it authorizes the trustees to sell the mortgage lands if default is made in the principal sum at maturity of the bond and apply the proceeds to satisfy the amount due.

The rights and obligations of the parties in an action upon these bonds were incidentally considered by this court upon a motion in this case to strike out certain parts of the answer of defendant. 19 Fed. Rep., 867. Upon that motion it was intimated that the plaintiff was entitled to recover the installments of interest unpaid unless the defendant could show that it had not made net
103 earnings sufficient, and had exercised its option to issue scrip in lieu of paying interest in money. It was not intended upon an interlocutory motion to foreclose the defendant from contesting fully its liability upon the trial of the action; and accordingly it has been strenuously insisted for the defendant that the interest is not payable in money; that the bond is an income bond on which interest accumulates, but is not payable until earned, and if not earned the bond is satisfied by payment in scrip.

The elaborate argument upon the trial has not changed the opinion previously entertained that there is nothing in the language of the mortgage which controls or qualifies the absolute promise in the bond to pay interest in money or in scrip. The mortgage deals only with the subject of the security which is to belong to the bondholders as collateral to the obligation, and with their auxiliary rights and remedies for enforcing the promise in the bond. If the bonds are to bear the construction claimed by the defendant, the bondholders for forty years, instead of being creditors of the company, are practically only preferred stockholders, with the privilege of exchanging their stock for the lands of the company. It would be a misnomer to call such instruments bonds. There is a plain promise to pay interest annually, and nothing to lead a purchaser to suppose that he is not to have his interest or scrip instead at the election of the defendant if the net earnings of the railway are not sufficient to pay the interest. If the interest is earned the
104 holder cannot be put off with scrip. If it is not earned he may be at the election of the company. The plaintiff was entitled to his money or the scrip, its substitute, on the day at which, by the terms of the bond, the defendant was to pay the interest or exercise its alternative. It is elementary that when a promise is in the alternative to pay in money or in some other medium of pay-

ment the promisor has an election either to pay in money or in the equivalent; and after the day of payment has elapsed without payment the right of election on the part of the promisor is gone and the promisee is entitled to payment in money. For various illustrations see McNitt *v.* Clark, 7 John, 465; Gilbert *v.* Dansforth, 6 N. Y., 585; Stevens *v.* Howe, 2 J. & Sp., 133; Stewart *v.* Donnelly, 4 Yerg., 177; Choice *v.* Mosely, 1 Bailey, 136; Butcher *v.* Carlisle, 12 Gratt., 520; Church *v.* Fetterow, 2 Penrose & W., 301; Trowbridge *v.* Holcomb, 4 Ohio St., 38; Perry *v.* Smith, 22 Vt., 301; Mettler *v.* Moore, 1 Black., 342.

The option in the bond here was evidently intended for the benefit of the defendant and to enable it to substitute scrip for money in case its net earnings or other resources were not such as to permit it providently to pay in money. There is no reservation in terms or by implication of a right to exercise the option after the day of payment, and that day having elapsed without an election by the defendant the bondholders are entitled to be paid in money.

105 Upon the trial it appeared that there was no formal presentment of the bonds in suit for payment of interest on the 1st day of July, 1882, or on the 1st day of July, 1883, but it was shown that shortly after each of those days the treasurer of the defendant, at the defendant's office, notified holders of the bonds that the defendant was not prepared to pay the interest, as the earnings of the railway had not been sufficient, and that no action had been taken by the defendant in reference to the issue of scrip. Before the commencement of this suit, induced by the suggestion that suits were about to be brought to recover the interest on the bonds, and on or about the 12th day of Oct., 1883, the directors of the defendant adopted a resolution providing for paying the interest in scrip. Notice of this action on the part of the defendant was given to the plaintiff and to the bondholders generally by publication. It is insisted for the defendant that the defendant is not in default until a demand by the plaintiff, and no valid demand having been made the plaintiff should fail in his action. Neither presentment or demand is a prerequisite to a right of action for the recovery of the interest. Neither is necessary when there is a promise to make payment at a specified time. It devolves upon the debtor to prove payment or readiness to pay. There is no distinction in this respect between notes and negotiable bonds (Savannah & Memphis R. R. Co. *vs.* Lancaster, 62 Ala., 55 Phila. & Balt. R. R. Co. *v.* Johnson, 54 Penn. St., 127), and the rule applies also to notes payable

106 in specific articles. Elkins *v.* Barkhurst, 17 Ver't, 105; Wiley *v.* Shoemaker, 2 Green (Ja.), 205.

If the defendant had been prepared to deliver the scrip when the interest matured it would have complied with its agreement and been absolved from liability. The law does not usually require the doing of a vain thing, and after the defendant had announced that it could not pay the interest and was not prepared to issue the scrip it would have been a nugatory and perfunctory act on the part of the plaintiff, when he was entitled absolutely to his money, to make

a formal presentment of his bonds and a formal demand of payment.

Judgment is ordered for plaintiff for $21,000, with interest on $10,500 from July 1st, 1882, and on $10,500 from July 1st, 1883.

(Endorsed:) U. S. circuit court, southern dist. N. Y. Henry S. Marlor *v.* Texas and Pacific R. R. Co. Opinion. Wallace, J. U. S. circuit court. Filed Aug. 27, 1884. Timothy Griffith, clerk.

107 United States Circuit Court, Southern District of New York.

HENRY S. MARLOR

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

Be it remembered that in this cause a stipulation was filed waiving a jury and agreeing to try the same to the court, and the same was submitted to the court upon the complaint and answer and exhibits thereto, and a statement of agreed facts duly signed by the attorneys of the respective parties, and upon the depositions of E. H. Emerson and G. B. Wooldridge, taken on behalf of plaintiff, and of C. E. Satterlee, on behalf of defendant.

Findings of Fact.

The court finds the facts of this suit as follows:

First. That the defendant, The Texas and Pacific Railway Company is, and at the several times hereinafter mentioned was, a foreign corporation duly incorporated under and by virtue of the acts of Congress of the United States of America.

108 Second. That on the 29th day of March, 1875, the stockholders of the defendant company, under and by virtue of its corporate powers and privileges, duly convened in corporate meeting and authorized and empowered the board of directors of the said defendant to provide for and to issue eighty-nine hundred and eight (8,908) bonds, called income and land-grant bonds, each for the sum of $1,000, bearing seven per cent. interest, the interest and the principal of said bonds to be payable in the United States currency and said bonds to mature in forty years from their date.

Third. That, in pursuance of said resolution of the stockholders of defendant and in pursuance of the authority conferred by its charter and of the several acts of the Congress of the United States of America under which said defendant was incorporated, the said defendant, on or about the 15th day of May, 1875, caused to be made, executed, and issued eight thousand eight hundred and fifty seven income and land-grant bonds, each for the sum of $1,000, bearing interest at the rate of seven per cent. per annum, which said bonds were duly signed by the president and secretary of said defendant company and were duly sealed with its seal, and that each of said bonds is in the words and figures as follows (the numbers being left blank):

THE UNITED STATES OF AMERICA.

No. —. $1,000.

The Texas and Pacific Railway Company.

Chartered by act of Congress.

Seven Per Cent. Income and Land-Grant Bond on the Eastern Division.

The Texas and Pacific Railway Company hereby acknowledges itself to be indebted to —— ——, of ——, or assigns in the sum of one thousand dollars, lawful money of the United States of America; which sum the said company promises to pay the said —— —— or assigns at the office of the company in the city of New York on the 1st day of January, A. D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent. per annum, payable annually on the 1st day of July in each year, as provided in the mortgage hereinafter mentioned.

This bond is one of a series of bonds numbered consecutively from one to eight thousand nine hundred and eight, of the denomination of one thousand dollars each, of like tenor and date, the payment whereof is secured by a first mortgage of even date herewith, duly recorded, upon certain lands heretofore granted to the Texas and Pacific Railway Company by the State of Texas or in which said company is in any manner interested, being a first lien or charge upon all those sections or fractional sections or square miles of land acquired or to be acquired by said company in constructing its lines of road east of Fort Worth under or by virtue of the
110 acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railroad Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and enactments relating thereto or under any of the special or general laws passed by the Legislature of the State of Texas and applicable to said companies or either of them or to the Texas and Pacific Railway Company, the total quantity of land to be acquired in constructing said lines of railway under the several grants being estimated at or about 7,600,000 acres. This bond has also — a security for the interest a mortgage lien upon the net income of the said The Texas and Pacific Railway Company, derived from operating its lines of railway east of Fort Worth, in the State of Texas, after providing for the operating expenses, the current repairs and reconstructions, and the interest upon the first and second mortgage bonds secured upon said lines of railway, the length of which, constructed and to be constructed, is estimated to be 524 miles, and in case such net earnings shall not in any one year be sufficient to enable the company to pay seven per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest, such scrip to be received at par and interest the same as money in payment for any of the company's lands acquired as aforesaid in Texas at the ordinary schedule price or it may be converted into capital stock of the company when presented in

amounts of $100 or its multiple. The holder of this bond is
111 entitled to the benefit of the additional security of the sinking fund provided for in said mortgage, consisting of the net proceeds of the sales of the lands aforesaid, which are to be applied from time to time to the purchase of said bonds at their market value, not exceeding par, or to their redemption, as provided in the mortgage aforesaid. This bond will also be received by the company at par and accrued interest in payment or exchange for any of its lands covered by the mortgage aforesaid at the current cash price of the same as fixed from time to time.

In witness whereof the said The Texas and Pacific Railway Company has caused these presents to be duly executed, sealed with its corporate seal, and attested by its proper signatures of its president or vice-president and secretary, this 15th day of May, 1875.

FRANK BOND,
Vice-President.

Attest: C. E. SATTERLEE,
Secretary.

Certificate of Trustees.

This bond is one of a series of bonds each for the sum of one thousand dollars, lawful money of the United States of America, bearing seven per cent. interest per annum, payable yearly, said bonds being numbered consecutively from number one to number eight thousand nine hundred and eight. The said bonds are
112 secured by a first mortgage upon all the lands of the Texas and Pacific Railway Company in the State of Texas granted in aid of the construction of its lines east of Fort Worth, and also upon the net income of said lines of railway, after deducting current expenses, reconstruction and repairs, and the interest upon the first and second mortgages on said lines of railway; and they are also receivable, the same as money, in payment or exchange for such lands at the current price of the same as fixed from time to time.

W. T. WALTERS AND
GEORGE D. KRUMBAAR,
Trustees.

Fourth. That prior to the first day of July, 1883, the plaintiff purchased in open market on the New York Stock Exchange, in the city of New York, and became the owner of 150 of the bonds mentioned and described in the third finding of fact herein, and became and is entitled to the interest due thereon on the first days of July in the years 1882 and 1883, according to the terms and conditions of said bonds.

Fifth. There was no formal presentment by the plaintiff of the bonds in suit for the payment of interest on the first day of July, 1882, or on the first day of July, 1883, or at any other time, but the court finds from the evidence that shortly after each of those days the treasurer of the defendant's office notified the holders of the
113 bonds of the defendant that the defendant was not prepared to pay interest, as the earnings of the railway *was* not suffi-

cient, and that no action had been taken by the defendant in reference to the issue of scrip. Before the commencement of this suit, and induced by the suggestion that suits were about to be brought to recover the interest on the bonds, and on or about the 12th day of October, 1883, the executive committee of the board of directors of the defendant adopted a resolution providing for the payment of interest in scrip. Notice of this action on the part of the defendant was given to the plaintiff and to the bondholders generally by publication before this suit was brought, and defendant notified plaintiff of its willingness to deliver his scrip to the plaintiff for the interest in suit, and the defendant at the trial tendered to him the scrip in open court, and the same was then and there refused by plaintiff.

Sixth. That on the first day of July, 1882, the average market price of the stock of the Texas and Pacific Railway Company, defendant, was 41¼; that on the first day of July, 1883, the market price of said stock was 37¼, and that on the 12th day of October, 1883, the average price of said stock was 22; that on the first day of July, 1882, the average market price of the scrip of the defendant company issued for interest on its said income and land-grant bonds shall, for the purposes of this suit, be taken to have been 45 to 50 per cent. of par value, and the average price of said scrip on the first day of July, 1883, shall be so taken to have been 53 per
114 cent., and that the average market price of said scrip on the 12th day of October, 1883, was 52 per cent., and that the market value of income and land-grant bonds on July 1st, 1882, was 63⅛ per cent., and on July 1st, 1883, was 62⅞ per cent., and that on the 17th day of November, 1883, the date of the commencement of this action, the market price thereof was 49¼ per cent.

The court also finds, as admitted by the plaintiff, that the following parts of the defendant's amended answer are true:

Commencing at folio 15, down to and including folio 20; also from and including folio 31 down to folio 35, and in folio 35 from the words "defendant states" down to the words "executed and issued;" also in folio 36, beginning at the figures 8857, down to and including the word "respectively;" also paragraph second of said amended answer, between folios 53 and 56, inclusive, with the exception of the words "in compliance with the solicitations of certain holders of said bonds;" also the third paragraph of said answer (written), commencing with the words "defendant further alleges," etc., and ending with the words "notice thereof," and also paragraph fourth of said amended answer, between folios 60 and 63, inclusive, down to the words "such scrip."

115 *Conclusions of Law.*

Upon the foregoing facts the court finds as conclusions of law—

First. That the defendant failed and neglected to exercise the option given to it in and by the terms of said bonds to pay the plaintiff the interest in scrip upon said one hundred and fifty (150) income and land-grant bonds due and payable by the terms thereof on the first day of July, 1882, and that the defendant likewise failed and neglected to exercise the option given to it in said bonds to pay the

plaintiff interest in scrip which by the terms of said bonds became due and payable upon said one hundred and fifty (150) bonds on the first day of July, 1883; to which conclusion of law the defendant then and there excepted.

Second. That the plaintiff is entitled to recover judgment against the defendant in the sum of twenty-one thousand dollars ($21,000), with interest on the sum of $10,500 from the first day of July, 1882, and with interest on the sum of $10,500 from the first day of July, 1883, together with the costs and disbursements of this action, and orders judgment accordingly; to which conclusion of law the defendant then and there excepted.

WM. J. WALLACE.

116 *Motion on Arrest of Judgment.*

United States Circuit Court, Southern District of New York.

HENRY S. MARLOR
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Now comes the said defendant and moves the court to arrest the judgment in this case for the following reasons:

First. The complaint sets out and contains no sufficient cause of action, in this: (*a*) that it does not show any actionable breach of the contract sued upon; (*b*) it proceeds upon the erroneous theory that the defendant is liable if it fails to exercise its option to issue scrip on the first day of July, 1882, and the first day of July, 1883; (*c*) it fails to aver any presentment of the bonds for the payment of scrip or interest, and does not allege that the company made any net earnings.

Second. This court has no jurisdiction of the cause of action or of the parties to this cause.

DILLON & SWAYNE,
Attorneys for the Defendant.

117 *Order.*

United States Circuit Court, Southern District of New York.

HENRY S. MARLOR
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

This cause came on to be heard pursuant to a stipulation of the parties waiving a jury and submitting the same to the judge; upon motion of the said defendant on arrest of judgment, and the said motion having been duly considered, it is now ordered and adjudged that the said motion be, and the same is hereby, overruled and denied; to which order and judgment overruling and denying the same the defendant then and there excepted.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court. Henry S. Marlor, plaintiff, against the Texas and Pacific Railway Company, defendant. De-

fendant's proposed findings of fact and conclusions of law. Motion and order. Dillon & Swayne, 195 Broadway, New York, attorneys for defendant. Due and timely service of a copy of the within proposed findings, &c., motion, and order is hereby admitted.
118 Dated September 11, 1884. Dos Passos Brothers, attorneys for plaintiff. U. S. circuit court. Filed Sep. 17, 1884. Timothy Griffith, clerk.

119 At a stated term of the United States circuit court for the southern district of New York, held in the United States court and post office building, in the city of New York, on the 17th day of September, 1884.

Present: Hon. William J. Wallace, judge.

Judgment.

HENRY S. MARLOR, Plaintiff,
ag'st
THE TEXAS AND PACIFIC RAILWAY COMPANY, Defendant.

The issues in this action having come on for trial before the Hon. William J. Wallace, judge, and the attorneys for the respective parties hereto having duly stipulated in writing to waive a jury, now, after hearing the proofs and allegations herein, and upon the pleadings and all the papers and proceedings heretofore had in this action, and after hearing John R. Dos Passos, of counsel for the plaintiff, and John F. Dillon, Esq., of counsel for the defend-
120 ant, and on motion of Dos Passos Bros., attorneys for the plaintiff, it is adjudged that Henry S. Marlor, the plaintiff herein, have and recover of the defendant, The Texas and Pacific Railway Company, judgment in the sum of twenty-one thousand dollars, with interest on the sum of $10,500 from the first day of July, 1882, to September 17th, 1884, amounting to the sum of $1,392\frac{61}{100}$ dollars, and interest on the sum of $10,500 from the first day of July, 1883, to September 17, 1884, amounting to the sum of $762\frac{61}{100}$ dollars, together with the costs and disbursements of this action, as taxed by the clerk of this court, at the sum of $49.77, making in the aggregate the sum of twenty-three thousand two hundred and four dollars and ninety-nine cents ($23,204.99.)

And it is further ordered and adjudged that the said plaintiff have judgment and execution therefor accordingly.

WM. J. WALLACE.

121 (Endorsed:) U. S. circuit court. Henry S. Marlor, pl'ff, ag'st The Texas and Pacific Railway Co., def't. Judgment. Dos Passos Bros., solicitors for pl'ff, 15 Broad St., N. Y. city. U. S. circuit court. Filed Sep. 17, 1884. Timothy Griffith, clerk.

122 Circuit Court of the United States, Southern District of New York.

HENRY S. MARLOR

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

It is hereby stipulated that the original income and land-grant bond now on file in the office of the clerk of this court as an exhibit to defendant's answer herein, shall be transmitted as a part of the record on the writ of error to the Supreme Court of the United States, and that a copy of said bond shall be substituted as part of the record to remain in the office of said clerk of this court.

Dated New York, October, 3d, 1884.

DOS PASSOS BROS.,
Attorneys for Plaintiff.
DILLON & SWAYNE,
Attorneys for Defendant.

Ordered accordingly October 9th, 1884.

ADDISON BROWN.

123 Endorsed: U. S. circuit court, southern district of New York. Henry S. Marlor, plaintiff, ag'st The Texas and Pacific Railway Company. Stipulation. Dillon & Swayne, att'ys for def't. U. S. circuit court. Filed Oct. 10, 1884. Timothy Griffith, clerk.

124 U. S. Circuit Court, Southern District of New York.

HENRY S. MARLOR

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

We hereby consent that the foregoing papers shall constitute the record to be sent by the clerk of the circuit court of the United States for the southern district of New York to the U. S. Supreme Court, on the appeal to said Supreme Court, in the above-entitled cause without prejudice to any motion to correct the record hereafter.

New York, October 9, 1884.

DILLON & SWAYNE,
Att'ys for Pl'ff in Error.
DOS PASSOS BROTHERS,
Att'ys for Def't in Error.

Endorsed: U. S. circuit court. Fil'd Oct. 11, 1884. Timothy Griffith, clerk.

125 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

HENRY S. MARLOR

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

Know all men by these presents that we, the Texas and Pacific Railway Company, as principal, and Jay Gould and Russell Sage, of the city, county, and State of New York, as sureties, are held and firmly bound unto the above-named plaintiff in the sum of thirty thousand dollars, to be paid to the said plaintiff; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-third day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas the above-named defendant has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named defendant shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[Seal of Comp'y.]

THE TEXAS & PACIFIC R'Y CO.,
By JAY GOULD, *President.*
JAY GOULD. [L. S.]
RUSSELL SAGE. [L. S.]

Sealed and delivered and taken and acknowledged this 23 day of September, 1884, before me—

[L. S.] WM. J. HARDING,
Notary Public, Kings County, New York.

Certificate filed in New York county.

126 UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Jay Gould, one of the subscribers to the foregoing instrument, being duly sworn, deposes and says that he is a resident and householder within this State; that he is worth the sum of thirty thousand dollars over and above all his just debts and liabilities.

JAY GOULD.

Sworn to this twenty-third day of September, A. D. 1884, before me—

[L. S.] WM. J. HARDING,
Notary Public, Kings County, New York.

Certificate filed in New York county.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

Russell Sage, one of the subscribers to the foregoing instrument, being duly sworn, deposes and says that he is a resident and a householder within this State, and that he is worth the sum of thirty thousand dollars over and above all his just debts and liabilities.

RUSSELL SAGE.

Sworn to before me this twenty-third day of September, 1884.

[L. S.] WM. J. HARDING,
Notary Public, Kings County, New York.

Certificate filed in New York county.

[Endorsed:] U. S. circuit court. Marlor *vs.* Texas and Pacific Railway Company. Bond for costs on —. ——, proctor. Approved Sept. 25, 1884. W. J. Wallace. U. S. circuit court. Filed Sept. 25, 1884. Timothy Griffith, clerk.

127 *Assignment of Error.*

Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-four.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
HENRY S. MARLOR, Defendant in Error.

Afterwards, to wit, on the fourth Monday of October, that being the second Monday in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the Texas and Pacific Railway Company, by Dillon & Swayne, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. That by the record aforesaid it appears that the judgment aforesaid, in the form aforesaid given, was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

Second. It appears by the record that the first conclusion of law found by the court is erroneous.

128 Third. It appears by the record that the second conclusion of law found by the court is erroneous.

Fourth. It appears by the record that the court erred in not holding the bonds in suit to be income bonds, on which the obligation to pay interest is dependent on the acquisition of net earnings for the year.

Fifth. It appears by the record that the court erred in holding that said bond was a promise to pay interest in money or scrip on July 1st of each year.

Sixth. It appears by the record that the court erred in holding that by failure to issue scrip on July 1st, 1882, and July 1st, 1883, the full amount of interest became payable in cash without presentment and demand, and that neither presentment nor demand was a prerequisite to a right of action.

And the said Texas and Pacific Railway Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

DILLON & SWAYNE,
Attorneys for Plaintiff in Error.

129′ UNITED STATES OF AMERICA, ss:

To Henry S. Marlor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the fourth Monday of October, eighteen hundred and eighty-four, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated Sept. 25th, 1884.

WM. J. WALLACE.

130 [Endorsed:] U. S. Supreme Court. The Texas and Pacific Railway Company, plaintiff in error, against Henry S. Marlor, defendant in error. Citation.

Due and timely service of the within citation is hereby admitted.
Dated New York, Sept. 24, 1884.

DOS PASSOS BROS.,
Att'ys for Def't in Error.

Endorsed on cover: S. New York C. C. U. S. No. 97. The Texas and Pacific Railway Company, plaintiff in error, *vs.* Henry S. Marlor. Filed October 13, 1884.

3-68

United States Supreme Court,

OCTOBER TERM, 1887,

No. 97.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

HENRY S. MARLOR.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON
AND W. S. PIERCE JR.,
For Plaintiff in Error.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE, N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1887.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, vs. HENRY S. MARLOR.	No. 97.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The plaintiff, Marlor, sued the Texas and Pacific Railway Company (plaintiff in Error) for two installments of interest, of $10,500 each, payable, as he claimed, on the first day of July, in the years 1882 and 1883, respectively, upon 150 income and land grant bonds issued by the company, and owned by him. The action was tried by the Circuit Court without a jury (the jury being duly waived), and judgment was given for the plaintiff in the amount of his demand.

THE BONDS upon which the action was brought are in the following terms (Record, pp. 3-6, 62, 63):

THE UNITED STATES OF AMERICA.

(No. —.) ($1,000.)

THE TEXAS AND PACIFIC RAILWAY COMPANY.

Chartered by Act of Congress.

Seven Per Cent. Income and Land-Grant Bond on Eastern Division.

The Texas and Pacific Railway Company hereby acknowledges itself to be indebted to of , or assigns in the sum of one thousand dollars, lawful money of the United States of America; which sum the said company promises to pay to the the said or assigns, at the office of the company in the City of New York, on the first day of January, A. D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent. per annum, payable annually on the first day of July in each year, as provided in the mortgage hereinafter mentioned.

This bond is one of a series of bonds numbered consecutively from one to eight thousand nine hundred and eight, of the denomination of one thousand dollars each, of like tenor and date, the payment whereof is secured by a first mortgage of even date herewith, duly recorded upon certain lands heretofore granted to the Texas and Pacific Railway Company by the State of Texas, or in which said company is in any manner interested, being a first lien or charge upon all those sections or fractional sections or square miles of land acquired or to be acquired by said company in constructing its lines of road east of Fort Worth under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company, the Southern Transcontinental Railroad Company, the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and enactments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas and applicable to said companies or either of them, or to the Texas and Pacific Railway Company, the total

quantity of land to be acquired in constructing said lines of railway under the several grants being estimated at or about 7,600,000 acres. This bond has also as security for the interest a mortgage lien upon the net income of the said The Texas and Pacific Railway Company, derived from operating its lines of railway east of Fort Worth, in the State of Texas, after providing for the operating expenses, the current repairs and reconstructions, and the interest upon the first and second mortgage bonds secured upon said lines of railway, the length of which, constructed and to be constructed, is estimated to be 524 miles, and in case such net earnings shall not, in any one year, be sufficient to enable the company to pay seven per cent. interest on the outstanding bonds, then scrip may, at the option of the company, be issued for the interest; such scrip to be received at par and interest the same as money in payment for any of the company's lands acquired as aforesaid in Texas at the ordinary schedule price, or it may be converted into capital stock of the company when presented in amounts of $100 or its multiple. The holder of this bond is entitled to the benefit of the additional security of the sinking fund provided for in said mortgage, consisting of the net proceeds of the sales of the lands aforesaid, which are to be applied from time to time to the purchase of said bonds at their market value, not exceeding par, or to their redemption, as provided in the mortgage aforesaid; this bond also will be received by the company at par and accrued interest in payment or exchange for any of its lands covered by the mortgage aforesaid at the current cash price of the same as fixed from time to time.

In witness whereof, the said The Texas and Pacific Railway Company has caused these presents to be duly executed, sealed with its corporate seal, and attested by the proper signatures of its president or vice-president and secretary, this 15th day of May, A. D., 1875.

———— ————, President.

Attest: ———— ————, Secretary.

(Here follows Certificate of Trustees.)

The complaint does not allege the failure of the Railway Company to acquire sufficient net earnings to pay

interest in money; nor any demand for the issue of scrip as provided in the bond. The essential and sole claim of the plaintiff is that, upon default of income, the failure to exercise the option to issue scrip *on the very day of the close of the fiscal year* entitles him to recover the full interest in money, and this without demand or presentation of his bonds (Record, p. 5; fols. 9–10). The answer alleges (Record, p. 50) it is an agreed fact (Record, p. 58, fol. 99), and the Court finds it to be true (Record, p. 64, fol. 114) that the bonds are registered obligations, on which interest is payable and scrip issuable only to registered holders; that by uniform and invariable practice from the first issue of the scrip, the bonds or authenticated orders are presented by the registered holders or their assignees, and receipts or vouchers taken on the issue of scrip; that the company cannot know to whom to issue or deliver scrip, or who is entitled to it until the bonds or assignments or orders are presented at its office and scrip demanded therefor, or until the registered holder properly identified, presents himself at its office and demands scrip; and that the plaintiff never presented his bonds and demanded or requested the issue of scrip, but that the defendant had offered to deliver to him scrip upon the execution of the proper receipt or voucher therefor.

The income and land grant mortgage, dated May 15 1875, securing the bonds in suit, and supplemental mortgage, dated March 23, 1876, are set out in full as exhibits to defendant's answer (Record, pp. 25–45).

A "statement of agreed facts" of this case appears in the Record, pp. 53–58. The parts of defendant's answer admitted in the agreed statement to be true (Record, p. 58), and found by the Court, as part of its

findings of fact, to be true (Record, p. 64), are, for convenience in reference, here set out in full as follows:

15 **II.** "And for other and further defense defendant alleges

"FIRST. That on the 29th day of March, 1875, defendant had outstanding bonds and mortgages securing the same, as follows:

"9,252 *land grant bonds*, secured by a first mortgage upon all the lands in the State of Texas, which the company had acquired or might thereafter acquire by virtue of its consolidation with the Southern Pacific Railroad Company and the Southern Transcontinental Railway Company, or by virtue of its consolidation with or purchase of any other railroad company in the State of Texas under the authority of the Acts of Congress of March 3d, 1871, and May 2d, 1872.

"Defendant further alleges that both the con- 17
struction bonds and the land grant bonds last above described were fixed obligations of defendant company, whereon the obligation to pay maturing semi-annual interest coupons was absolute and without condition or qualification. That the mortgages securing said bonds contained provisions for foreclosure in case of default in the payment of current interest; the provision to this effect in the mortgage securing said land grant bonds, being in the following terms: 18

"'And if default shall be made in the payment of the interest which shall accrue or become due upon the said bonds, or any of them, for the space of sixty days, when the same shall become due, the said trustees and the survivors of them, and the successors and successor of such survivors, may thereupon sell at public or private sale, for the best price which can be obtained for the same, all or any part of said lands which shall then remain unsold, sufficient to pay the interest then remaining due upon any of said bonds which shall then be outstanding and unpaid; and such trustees may appoint one or more 19
agents or attorneys to make sales, execute conveyances and receive the purchase money and pay the said interest then remaining unpaid on said bonds or any of them, or apply the same *pro rata*, if not sufficient to pay said interest in full.'

"Defendant prays that upon the trial of this cause it

may have leave to refer the Court to said construction and land grant bonds and to the mortgages securing the same as parts of this answer.

"Defendant further alleges that on said 29th day of March, 1875, defendant's road was only partially completed to Fort Worth, in the State of Texas, there being then built and in operation about 325 miles thereof. That defendant was unable to meet the interest on said bonds, and was in default therefor. That on said day the stockholders of the defendant company met to consider and retrieve the financial situation of the defendant, to readjust and reorganize its debt, to provide aginst recurring defaults which endangered foreclosure, and to provide means for completing its road to Fort Worth; and at said Stockholders' Meeting, held as aforesaid on the 29th day of March, 1875, did resolve as follows:

"'*Resolved*, That the Board of Directors shall be and they are hereby requested and fully authorized and empowered to provide for and to issue eighty-nine hundred and eight (8,908) income and land grant bonds, each for the sum of one thousand dollars, bearing seven per cent. interest, the interest and the principal of said bonds to be payable in United States currency, and said bonds to mature in forty years from their date, and to secure the payment of the interest and the principal of said bonds by a first mortgage upon all the lands heretofore granted to this company, or in which this company in said State is in any manner interested, being a first lien or charge upon all those sections or parts of sections or square miles of land acquired by the Texas and Pacific Railroad Company, or to be acquired by said company, in constructing its lines of road east of Fort Worth, under or by virtue of the acts of incorporation of the Southern Pacific Railroad Company; the Southern Trans-Continental Railway Company; the Memphis, El Paso and Pacific Railroad Company, or of the several supplements and amendments relating thereto, or under any of the special or general laws passed by the Legislature of the State of Texas, and applicable to said companies, or either of them, or to the Texas and Pacific Railway Company; the total quantity of land so to be acquired in constructing said lines of railway, being estimated at about 7,600,000

acres; and said mortgage or deed of trust shall also include the net income of the company from the operating of its lines east of Fort Worth, after providing for the operating expenses, the current repairs and reconstructions, and the interest on the first and second mortgages hereinbefore provided for; and there shall be included in said mortgage or deed of trust, a provision for a sinking fund out of the net proceeds of sales of land, and by the receiving of said bonds in payment for purchases of lands covered by the mortgage. The bonds thus provided for shall be exchangeable for outstanding Land Grant bonds, and used in purchase of material and supplies, and for construction work, or may be applied toward the payment, of any of the company's indebtedness or obligations."

"Defendant states that in pursuance of the authority conferred in and by the aforesaid resolutions, the Board of Directors of defendant company caused to be made, executed and issued:

"8,857 Income and Land Grant Bonds, secured by mortgage executed as prescribed in said resolutions, a copy of one which said bonds and of the mortgage securing said bonds are annexed hereto, made parts hereof and marked Exhibits A and B respectively.

"SECOND. Defendant further alleges that subsequently to the first day of January, 1876 (as of which date the first installment of said income and land grant bonds was issued as aforesaid), and in the years or interest periods ending, respectively, on the first days of July, 1877, 1878 and 1879, the net earnings of defendant company, as defined in said bonds, and in the mortgage referred to in said bonds, were insufficient to enbale it to pay the interest on its said income and land grant bonds then outstanding at the various dates aforesaid; that during and throughout said years or interest periods no interest was paid upon said bonds, nor was any scrip issued for such interest or for any portion thereof; that on the 16th day of February, 1880, and in pursuance of a resolution of its Board of Directors, defendant issued scrip for the interest accumulated during the entire period included between the said first day of Jauuary, 1876, and the first day of July, 1879, as appears upon the face of said scrip; that the net

earnings of defendant road having been so insufficient to enable it to pay the interest on said bonds for the years ending July 1st, 1880, and July 1st, 1881, defendant issued scrip for the interest for such years respectively.

"THIRD. Defendant further alleges that official returns recently received and now on file at the office of defendant company in the City of New York, from the Auditor of said company, show, and defendant, upon information and belief, therefore avers the fact to be, that for the year ending July 1st, 1882, there was a deficit of $195,076.17 in the earnings of said road, and that for the year ending July 1st, 1883, there were surplus earnings of $131,867.90, thus showing a net deficit for the operations of said two years of $63,208.27. That the fact that the net earnings of said two years were insufficient to enable defendant company to pay the interest on said income and land grant bonds, as provided therein, was promptly made known and declared by defendant company to its bondholders, and that the plaintiff had due notice thereof.

FOURTH. Defendant further alleges that its said income and land grant bonds are, as aforesaid, registered obligations; that interest thereupon is payable only to registered holders thereof or to their assignees by duly executed and acknowledged or authenticated order or assignment, at the office of defendant company, and upon the delivery by such registered holders or their assignees by duly executed and authenticated order or assignment of receipts for such interest; or, in
61 case scrip is issued, of receipts for such scrip; that by uniform and invariable practice from the first issue of scrip for said bonds, such bonds or such authenticated orders or assignments thereof are presented by the payee or registered holder or such assignee at the office of the defendant for scrip. That when scrip is delivered thereon no indorsement is made upon the bond, but the receipt or voucher for such scrip so issued and received is signed by the person receiving the
62 same, and the defendant cannot know to whom to issue or deliver scrip, or who is entitled thereto, or who will receive the same until the said bonds or such assignments or orders are presented at its office as aforesaid, and scrip demanded thereon, or unless the registered holder, properly identified, presents

himself at the office of the company and demands the issue of the scrip. And the defendant says, on information and belief (as in paragraph sixth, part I. hereof) that the said plaintiff, in respect of the said interest sued for herein, never presented the
63 said bonds and demanded or requested the issue of scrip for the years 1882 and 1883; but the defendant says that it has offered to deliver and is now ready to deliver scrip to the plaintiff for and in respect of the said bonds in suit, for the years 1882 and 1883, on the production of said bonds and the execution of the proper voucher or receipt for such scrip."

Assignment of Errors.

FIRST. That by the record in this Court it appears that the judgment of the Court below was given for the defendant in error against the plaintiff in error, whereas the said judgment ought to have been given for the said plaintiff in error against the said defendant in error.

SECOND. It appears by the record that the first conclusion of law found by the Court is erroneous.

THIRD. It appears by the record that the second conclusion of law found by the Court is erroneous.

FOURTH. It appears by the record that the Court erred in not holding the bonds in suit to be income bonds, on which the obligation to pay interest is dependent on the acquisition of net earnings for the year.

FIFTH. It appears by the record that the Court erred in holding that said bond was a promise to pay interest in money or scrip on July 1st of each year.

SIXTH. It appears by the record that the Court erred in holding that by failure to issue scrip on July 1st, 1882, and July 1st, 1883, the full amount of interest became payable in cash without presentment and demand, and that neither presentment nor demand was a prerequisite to a right of action, and that the defendant's tender of scrip did not entitle it to judgment. (Record, pp. 69, 70.)

SEVENTH. The Court erred in not sustaining the defendant's motion in arrest of judgment (Record, p. 65.)

ARGUMENT.

THE FUNDAMENTAL DIFFERENCES between the parties are these :

PLAINTIFF'S CONTENTION.

The plaintiff's contention, adopted by the Court below, is :

> That this obligation, termed an income and land grant bond, is an obligation for the payment of the interest each year ABSOLUTELY AND AT ALL EVENTS in money, on the 1st day of July, irrespective of net earnings, in cash or in specific articles, viz.: scrip. And unless the company EXERCISES THIS OPTION ON THE VERY DAY, the interest becomes an absolute debt for the full, nominal or par amount thereof, solvable in money only, and this although no demand was made by the bondholder for interest or scrip, and although no net income has been earned during the year; and although, when after July 1st, the plaintiff demanded payment, the company tendered him scrip and kept the tender good.

The Circuit Court held the plaintiff's view to be correct, and for such error its judgment ought, we submit, to be reversed.

The failure to exercise the option on the day is the *gravamen* of plaintiff's cause of action (Record, p. 5, fols. 9, 10).

The Company's Contention.

The defendant's contention, as set out in the answer, and upon the facts as found by the Court below, is threefold:

I. The defendant contends that the bond is what it purports to be—an INCOME BOND; that the interest is not payable absolutely in money, July 1, unless net earnings, as defined in the bond and mortgage, have been made.

If sufficient net earnings, as defined in bond and mortgage, have not been acquired during the year, the interest accumulates until earned, or until paid out of the sinking fund created by the sale of the mortgaged lands, or until the bond with accrued interest becomes due, unless the company exercises its option to issue scrip If the option is not duly exercised the bondholder may not be bound to accept the scrip, but stands upon his rights as they existed before; and the effect of a failure to exercise the option on the day or afterwards, is not to convert the interest, which is payable only out of income, into a present fixed obligation to pay in money.

The bond is not an absolute obligation to pay the interest in cash or in "specific articles" of equal value, and so does not fall within the rule of law invoked by the plaintiff and adopted and applied by the Circuit Court.

The language of the bond, "then scrip may, at the OPTION of the company, be issued for the interest," leaves it entirely optional with the company (if there have been no net earnings) whether

it will issue scrip or not, and the failure to exercise this option creates or imposes no liability whatever, since the interest is not payable ABSOLUTELY, AND SINCE THERE IS NO PROVISION IN THE BOND OR MORTGAGE MAKING THE INTEREST PAYABLE ABSOLUTELY ON THE FAILURE OF THE OPTION.

The Circuit Court erroneously, we submit, held otherwise, and on this ground its judgment ought to be reversed.

II. That if the defendant is mistaken in supposing the bond to be a cumulative INCOME bond, and if the obligation is absolute to pay the interest each July 1, irrespective of net earnings, or to pay in scrip, THIS OPTION NEED NOT BE EXERCISED AT THAT DAY, and it is sufficient if the scrip is ready for the bondholder when he demands it. The company is not bound to seek the bondholder and tender the scrip on the day or at any time. The record in this case shows that the scrip was seasonably tendered by the company to the plaintiff, and that the tender was kept good.

The Circuit Court held against the defendant on these propositions, for which error its judgment ought, we submit, to be reversed.

III. That if the plaintiff is right in his construction of the bond, viz., that it is not an income bond, and that the obligation is absolute to pay interest on each July 1, unless the option to issue scrip is exercised that day, the effect of such default or of any default on the part of the company, is not to make it liable for the full amount of the interest, but only for the value of the scrip on the date of default, whatever the default may consist in, or at whatever time the default is complete, whether on July 1, or not until demand for scrip and refusal to issue it.

The Circuit Court held otherwise and for this error its judgment ought, we submit, to be reversed.

Upon a careful study of the Income Bond and of the Mortgage securing it, we submit the following as a sound view of its meaning and intent.

The true construction of the Income and Land Grant Bond and Mortgage.

I. The company is not liable to be sued at law in respect of the interest on the bonds on the failure to pay the same on the first day of each successive July, if there have been no net earnings out of which to make payment of interest.

The covenant in the bonds is to pay the principal on the first day of January, 1915,

"with interest thereon at the rate of seven per cent. per annum, payable annually on the first day of July in each year, *as provided in the mortgage hereinafter mentioned.*"

Not to pay absolutely and at all events, but only to pay in the manner provided in the mortgage, or if you please, the mortgage and bond.

The words above "*as provided in the mortgage hereinafter mentioned,*" are of capital and controlling importance. If they be overlooked or not given their proper effect, we shall surely go wrong. They are never to be lost sight of in construing the instruments with which we are dealing. If an absolute promise to pay the interest on the first of each July had been intended, the words in italics would have been omitted. They were inserted for the express and only purpose of qualifying the covenant to pay interest; and they do so qualify it. They are proper words to limit, or qualify; or make conditional or defeasible a covenant to pay in-

terest; and the word "provided," here used, is especially apt for that purpose.

This reference to the mortgage incorporates it as a part of the contract; and the bond and mortgage are to be read as one instrument.

"A purchaser of bonds which refer to the mortgage securing them, is bound by any statements contained in the mortgage affecting the security. The mortgage referred to *necessarily becomes a part of the bonds* in determining exactly what they are represented to be."

Jones on R. R. Securities, § 203.
Caylus vs. N. Y., K. & S. R. R. Co., 10 Hun, (N. Y.), 245.

"Where two or more instruments are executed at the same time, relate to the same subject matter, and one refers to the other, either tacitly or expressly, they are to be taken together and to be construed as one instrument."

Vangine vs. Taylor, 18 Ark., 65.
Dillingham vs. Estill, 3 Dana (Ky.), 23.
Adams vs. Hill, 16 Me., 215.
Rorabacker vs. Lee, 16 Mich., 169.
Rogers vs. Kneeland, 13 Wend., 114.
Spangler vs. Springer, 22 Pa. St., 454.

In Paterson vs. Ellis, 11 Wend., 260, it was held that where a legacy is given:

"When the legatee shall attain, or *provided* he does attain the age of twenty-one, the legacy does not vest until the contingency happens."

See also as to the word "provided."

Wayman vs. Southard, 10 Wheat., 1, 30.
Voorhees vs. Bank, 10 Peters, 471.
Minis vs. U. S., 15 Peters, 445.

So here the word "provided," as well as the whole clause in which it stands is intended to qualify the

covenant to pay interest. It is not a covenant to pay interest absolutely, but a covenant to pay on the terms and condition, and in the manner provided in the mortgage, and the mortgage and bond in this regard are not different. The covenant then being *not* to pay absolutely; but, as provided in the bond and mortgage, let us look to them and see what they do provide in regard to payment of interest. When we take both instruments by " the all fours " and search through them, we do not find any covenant to pay interest absolutely on the first day of July in each year; but only agreements to pay interest as follows: *First*, If net earnings have been made: *second*, to pay in land, that is, when the bond is exchanged for land; *third*, to pay it in connection with the bond out of the sinking fund as provided in the mortgage.

THE LANGUAGE *of the bond*, " Then scrip *may, at the* OPTION of the company be issued," for interest is intended simply to leave it wholly optional with the company, if there are no net earnings, whether it will issue scrip or not. The language is not that it " *shall* " in the contingency named issue scrip; but that it " *may* " do so, at its option. If there were no net earnings on a given first day of July, then there is no default and no obligation to pay, and the failure to exercise the option cannot be held to create or impose a liability to pay the amount of interest in money for the plain reason that the company did not promise to pay absolutely in money, and for the further reason that there is no provision in the bond and mortgage making the company liable to pay the amount of interest if it failed to exercise the option, created for its own exclusive benefit;

and yet the plaintiff makes the alleged failure to exercise this option the *gravamen* of his complaint.

The foregoing clearly distinguish this case from all alternative contracts for the payment of a fixed sum on a certain day "in specific articles," on which the plaintiff relies.

ANOTHER ARGUMENT in favor of the proposition that the right to issue scrip is purely discretionary with the company, and its non-exercise attended with no penalty, is that the charter of the company limits the amount of capital stock which can be validly issued, and therefore the option to issue its scrip convertible into stock, was for this, among other reasons, reserved entirely to the company, and it cannot be made liable for a failure to exercise it since the creditor has no vested right in its exercise.

RECURRING TO THE COVENANT in the bond, to wit, to pay interest "*as provided in the mortgage*," this, it will be perceived, is not an absolute and unconditional promise to pay the interest on the first day of each July; but a promise to pay as provided in the mortgage; the bond and mortgage to be read as one. It remits us to the bond and mortgage to see what provisions are therein made for the payment of interest. When the bond and mortgage are carefully scrutinized, it will be seen that they contain no promise to pay current installments of interest except out of net earnings; and this is conditioned upon net earnings, as defined in the mortgage, being acquired. We repeat that the bond and mortgage contain no obligatory covenant to pay the annual interest, except out of net earnings if these are acquired. And the income is first pledged in favor of the interest on the prior *fixed* mortgage bonds.

And the income bond and mortgage contain no *promise* to issue scrip, only an *option* to issue it.

II. THE BOND AND MORTGAGE, however, contain cercertain *provisions for the benefit of the holders* of the bonds, and these are as follows:

A. *To pay the interest annually out of net income, if it has been earned.* If sufficient net income has been earned it must be applied to the payment of interest. That is the obligation. If it has not been earned then the interest is not due and payable, so as to constitute a breach of the bond; but is cumulative until net income is acquired, or until the maturity of the bonds, unless the company choose to exercise the option of issuing scrip therefor. This option is given for the benefit of the company. It cannot be compelled to exercise it, but it may do so. The scrip, if issued, is receivable in payment for land or convertible into stock. Charter limits stock to $10,000,000.

B. *A sinking fund is created in case there are net proceeds of the sales of the mortgaged lands*, and each year the money in the sinking fund is to be *exclusively applied* to the purchase of bonds and *accrued interest* thereon at the lowest offer; but if they cannot be purchased for par or less then bonds are to be called by lot sufficient to equal the accumulations of the sinking fund. Note that the sinking fund cannot be used to pay current interest.

C. *The holder of the bond has a right to use the same at par and accrued interest at any time in the purchase and payment of lands covered by the mortgage.*

Such is the general scheme of the bond and mortgage. The circumstances under which they were issued, and the resolutions authorizing the issue, which appear in the record, as well as the terms of the instruments, combine to show that it was not intended to render the company personally liable to pay the interest as it annually fell due, unless there were net earnings.

First. The circumstances under which it was issued.

The mortgage recites an existing outstanding land grant mortgage, made July 1st, 1872, upon all the company's land in the State of Texas, under which there were outstanding 9,252 bonds. These were *fixed* bonds, not *income* bonds; and they were all to be retired. The company's road was incomplete, and there were also existing fixed mortgages on it at the rate of twenty-five thousand dollars per mile, in respect of which the company was then in default (Record, pp. 26, 27, 47, 48. Admitted allegations of answer; *Ante*, pp. 5, 6. Found by the Court to be true; Record, p. 64, fol. 119).

The income and land grant mortgage in question was authorized by the stockholders at a meeting held on the 29th day of March, 1875, at which the stockholders provided for issuing a fixed mortgage for twenty-five thousand dollars per mile on the road; and *after* thus authorizing a fixed mortgage for this sum per mile, they proceeded to authorize the issue of *8,908 income and land grant bonds* to be secured by a *first* mortgage upon the lands in Texas, which could only be done by retiring the existing land grant bonds of 1872, and securing the same on the net income of the company,

and by a sinking fund out of the proceeds of the sales of the lands, and by a stipulation to receive said bonds in payment for lands covered by the mortgage. (See substance of resolutions recited in the Income and Land Grant Mortgage, Record, pp. 48, 49.)

At this stockholders' meeting, the company was dealing with the whole subject of its indebtedness and necessities, and it provided therefor, by authorizing the creation of two distinct classes of securities, one known as *fixed* mortgages, that is, mortgages requiring absolutely the interest to be paid at stipulated periods, and the other an *income* obligation. The difference between a fixed mortgage and bond, and an income mortgage and bond is well known in the financial markets. A fixed bond is a security of a high character. The income bond is a security of an inferior grade. The fixed mortgage is usually a first lien; the income mortgage a second or inferior lien. An income mortgage presupposes embarrassment or a salutary fear of it, and is intended to protect the company from the perils to which a fixed obligation would expose it. Hence the resolutions of the stockholders authorized an INCOME BOND, *which means ex vi termini that there is no absolute obligation to pay at stated interest periods; but only a present obligation to pay if income is acquired.*

There are two classes of "income bonds;" one called *non-cumulative*, which means that unless income is acquired no obligation whatever exists to pay the interest; second *cumulative*, which means that if income is not earned at the time when the interest falls due, the interest stands over until income is acquired or until the maturity of the bond, unless some other provision is made for it. *In any event it is essentially*

the nature of an income bond that the interest on it is not to be presently paid absolutely.

In the mortgage authorized by the stockholders and in the instrument executed there *is pledged for the security of the bonds the land grant of the company.* The holders of the bonds are entitled to the benefit of these provisions in respect of the lands, provided interest is not paid out of net earnings:

FIRST, the lands are required to be sold by the trustees, and all of the net proceeds of the sale of *all* lands is carried into the sinking fund, which sinking fund can be used only for the purpose of retiring these bonds and accrued interest. *Observe that it cannot be used for the purpose of paying current interest;* but ALL the sinking fund is to be used in purchasing bonds at the lowest market rate if they can be had at less than par, or at par, but if they cannot be had at this price then bonds are to be drawn by lot equal to the accumulations of the sinking fund on hand. (Mortgage: Record, pp. 34, 35; fol. 57). *It therefore follows that it was understood that no part of the proceeds of the sale of lands could be used for the payment of the current interest on these bonds.*

SECOND. The holder of the bonds can at any time use them and the *accrued interest* thereon in payment for lands purchased. (Record, p. 24). If not thus used, then the mortgage will fall due at its maturity and the lands stand for the equal benefit of the outstanding bonds and accrued interest.

In the light of this exposition it is readily seen why these bonds were called "*income and land grant bonds.*"

THE HOLDER OF THESE BONDS HAS, WE ADMIT, THE FOLLOWING RIGHTS:

I. An absolute right to be paid the interest in money out of net income, if earned.

II. To exchange the bond and accrued interest for land.

III. To hold the bond, unless paid out of the sinking fund (which locks up all the proceeds of land sales), until it matures, and enforce the principal and interest against the mortgaged estate and the company.

On the other hand, the company has no right or option to let the interest run on or to issue scrip if there are net earnings. The company reserved the *option* to issue scrip if there were not net earnings, since it might be advantageous to it in two respects:

I. If scrip is issued it can be used separately to pay for lands, whereas unless scrip was issued the holder would have to surrender the bond if he wished to purchase lands, and if scrip was issued and used by the holder in payment for lands the amount of debt would thus far be extinguished.

II. Scrip could be converted into stock which might be to the advantage of the company, since stock is a non-interest-bearing liability.

Whether it would be more advantageous to the company to let the interest accumulate or to issue scrip, the company expressly reserved the option to decide for it-

self, *and the refusal to exercise this option cannot be made a ground of liability.* The plaintiffs' case, which rests upon such an alleged refusal, has therefore no ground to stand upon.

As THE COMPANY ISSUED ITS INCOME BONDS and retired its prior fixed land grant bonds; as it made at the same time prior fixed mortgages on its road for twenty-five thousand dollars per mile, and pledged the income of the road, first to payment of these fixed obligations; as the company had pledged the lands of the company for the security of the income bonds, and the proceeds of the sales were to go into a sinking fund, so that it would be without means from this source with which to pay interest annually, it is obvious why the company intended to make it an *income* obligation; otherwise the scheme would have been suicide—bankruptcy *in limine.* The obligation was an *income* obligation, imposing no liability absolutely on the company, in respect of the payment of current interest each year. If it imposed such an obligation, it would be evident that the company would be insolvent from the start. Since the earnings of the road were pledged to the fixed mortgage bonds, and since the proceeds of the sale of lands could not be used for this purpose, the only way, therefore, that the company could pay this interest would be to borrow the money, and how could it borrow money without any security?

According to the plaintiff's construction, the company must borrow money, if it does not pay in scrip, which, under the circumstances, is impossible, and

could not have been meant. The defendant's construction is, that if no net earnings are acquired in any one year, the *option is to let this interest accumulate until paid in some of the modes provided in the mortgage, or to issue scrip.*

Hence, the obligation is called by the stockholders, and in the bond and mortgage itself, an "*income*" bond.

Hence, no *coupons* were attached, and the instrument *is silent as to paying the current interest*, except out of net earnings, or in scrip, or the bond itself out of the sinking fund, or in exchange for land.

Hence, no provision exists in this mortgage such as exist in the fixed mortgages for enforcing payment of interest as it falls due. Hence, no obligation or provision exists that if the interest is not paid the *debt itself shall fall due*, which is usual in all railway mortgages where a fixed obligation is secured. Hence, no *provision in the mortgage exists for any default* in respect of the payment of *interest;* but only a provision for a default at *maturity.*

FOR THESE REASONS: We submit that the plaintiff's theory, which was adopted by the Circuit Court, that this bond imposes an absolute liability to pay interest, irrespective of net earnings, or to pay in scrip, is not sound, since such an obligation is in no sense an *income* obligation, which means an obligation on which any present liability to pay current interest depends upon the acquisition of net earnings.

FOR THESE REASONS: We submit, also, that the defendant's contention is the true one, viz., that this bond is what it purports to be—an INCOME BOND, whereon there is no absolute obligation to pay current

interest each July 1st, unless there have been net earnings. If there have been net earnings the company must pay. If there have been no net earnings, the company is not in default, for it has not promised to pay absolutely on July 1st, but only out of income. *The option is for the company's benefit.* If duly exercised, and scrip is tendered, the bondholder may be compelled to take it if there have been no sufficient net earnings to pay his interest. *But if the option be not duly exercised, the bondholders' rights exist as they were before*, and this failure to exercise the option does not have the effect to transmute an *income* obligation into a *fixed* obligation, or rather to *create* a liability, when none existed before. The following seems very plain: July 1st has arrived and there is no net income, and hence no present liability, and yet it is contended by the plaintiff, and it was so adjudged by the Circuit Court, that the failure to exercise at a time when the company is not in default an option given for the benefit of the company has the damaging and disastrous, the inconceivable, and certainly unintended, effect to *create* a liability when none existed at the time of the failure to exercise the option, viz., July 1st. This construction defeats the obvious intention of the parties, for it makes the option a damage, instead of a benefit, to the company.

If the option were to issue scrip in case there were sufficient net earnings, and thus enable the company to keep the money which it had promised to pay the bondholder, then the principle contended for by the plaintiff that a failure or refusal to issue and deliver the scrip would make the company liable to an action

for the amount or for damages for such failure and refusal, might be applicable.

But it would be unjust, and directly in the face of the intention of the company, and with all respect it seems to us unreasonable to apply that principle, as the Circuit Court did, to this contract.

THE FOREGOING is a condensed or synoptical view of the true construction of the bond in suit. In the next point the argument in support thereof is amplified and enforced more in detail.

I.

The bond imposes no present liability for interest if sufficient net earnings have not been acquired. This results from the nature and terms of the obligation.

The plaintiff construes the covenant in the bond to be a fixed alternative absolute obligation of the company to do *one of two* things and to mean the same as if it read:

"The company hereby promises to pay to the holder hereof $70 in cash (that being one year's interest) on July 1 each year, if net earnings are made, or $70 cash or scrip on July 1, if there are no net earnings."

Such also was the opinion of the learned Circuit Judge.

Record, pp. 59, 60.

The company contests this construction, and denies that it made an alternative obligation to pay in cash or scrip on July 1, and says it bound itself absolutely to do but *one* thing on July 1, and that is to pay the interest out of net income if there was any. The company construes the obligation as if it read:

"The company promises to pay to the holder $70 interest in cash on July 1, if there have been net earnings sufficient out of which to pay it; if not, then to pay it (*a*) out of the first future net earnings that are acquired, or (*b*) to receive it at any time in connection with the bond in payment for land, or (*c*) to pay it in accordance with the sinking fund provisions, the company reserving the option to issue scrip for the $70, which scrip is receivable as money in payment for lands or convertible into the capital stock of the company."

The bonds in suit are styled *Income* and *Land Grant* bonds. The purpose of the issue, as appears by the recitals of the mortgage, was, primarily to provide for the retirement and cancellation of outstanding *Land Grant* bonds issued in 1872 (Record, pp. 26, 31). The bonds in controversy are, then, primarily, Land Grant bonds—that is to say, they are secured especially upon the lands of the company; but they are also Income bonds, and it is with this latter feature of the obligation that we are immediately concerned in this controversy, and for this reason: It will appear subsequently herein (and from the terms of the mortgage securing the bonds in suit), that the lands of the company, as well as the railroad itself and its appurtenances, are an available security only at the *maturity of the obligation*—that is, there can be no foreclosure on the lands or railroad until the maturity of the *principal sum* mentioned in the bonds.

Hence, as this suit respects intermediate interest installments, we are not concerned with a feature of the bond which has no relation to, or bearing upon, the obligation as respects intermediate or current installments of interest. It is with the income feature, *ex vi termini*, that we have to deal in this suit.

An obligation may well be an income bond and a land grant bond at the same time. There is no conflict between the distinguishing characteristics of the two classes. The essential elements of both may co-exist in the same obligation. The bond in suit is practically the old land grant bond of 1872, with an income incident engrafted upon it, and modified in its terms only as was necessary by reason of the nature of this addition. But as the office of this new incident was to MODIFY THE OBLIGATION, and afford a *new security* in respect to *current interest*, it is with this incident that we are now especially to deal. The first inquiry, then, must be: *What is an income bond?* The security is a familiar one, and its name imports its definition.

The term "Income Bond" has a meaning as fixed and definite as the term "First Mortgage Bond." It imports, in financial markets, and in all quarters where such bonds circulate, an obligation whereon the payment of interest is conditional upon the acquirement of *net income*. There are two recognized classes of these obligations: (*a*) Those upon which the obligation to pay interest ceases absolutely upon the failure of net income, and (*b*) Those upon which the obligation to pay interest, in default of net income, rests in abeyance until such income accrues, or until the maturity of the principal sum, the interest debt accumulating in the meantime. Hence the familiar terms "cumulative"

and "non-cumulative" income bonds. Such bonds constitute a familiar security, about the character of which there is in usage and practically no doubt or question. They are contra distinguished from obligations which impose an absolute and unconditional liability for interest. The stockholders' resolutions of March 29th, 1875, after providing for certain FIXED obligations, authorized the issue of 8,908 INCOME and Land Grant Bonds (Rec., p. 27).

THE STOCKHOLDERS AUTHORIZED AN INCOME AND LAND GRANT BOND, AND NOT A FIXED OBLIGATION AS RESPECTS CURRENT INTEREST.

The part of the stockholders' resolutions which is material in this inquiry is that which fixes the character of the bonds to be issued. It is this:

"Resolved, That the Board of Directors shall be, and they are hereby requested and fully authorized and empowered to provide for and to issue eighty-nine hundred and eight (8,908) income and land grant bonds, each for the sum of one thousand dollars, bearing seven per cent interest, the interest and principal of said bonds to be payable in United States currency, and said bonds to mature in forty years, &c." (p. 27).

This resolution was adopted in 1875. The operations of the road during the period which preceded that date had demonstrated that its earnings were inadequate to provide for the interest on the outstanding land grant bonds. Instead of funding the past due and defaulted coupons on those bonds, the company determined, with the assent of the bondholders, to issue a new security, which would rescue it from the peril of foreclosure. No other reason for the retirement of the old bonds and the substitution of an

obligation with an income incident can be suggested or conceived. The purpose and aim of the transaction appear upon its face, unless it was absolutely without purpose and aim. Foreclosure and bankruptcy could only be averted by the issue of an obligation which imposed no liability beyond the net income. Hence the directors were authorized and requested to issue such an obligation. The transaction authorized was, practically, a reissue of the old land-grant bonds, with their liability and security for recurring interest reduced to the standard of the net income, and their *ultimate* security so enlarged as to embrace the entire property of the road.

The directors of the Texas and Pacific Railway Company, in the issue of this obligation, derived their authority and the limitations of their powers in the premises from the action and resolutions of the corporate body (and of that action plaintiff is expressly notified by the recitals and references contained in his bond).

The plaintiff, as holder of certain Income and Land Grant Bonds of the company defendant, which expressly refer to the mortgage for the manner of payment, is affected, in law, with notice of the contents of the mortgage and of every fact in respect of which the mortgage should have put him upon inquiry (see cases *ante*, p. 14). He is also to be held to be cognizant of the extent and distribution of powers under the charter of the company. He must know that the character of the obligations to be issued by the company is a matter controlled and regulated by the corporate body, and that under the laws applicable to the defendant the powers of the directors in the premises are derived from the stockholders. That

where the stockholders have by definite and unequivocal action fixed and prescribed the character of a corporate obligation, it is the office of the directors to do, as they have done in this case; that is, to follow the instructions of the stockholders and to issue an obligation which shall impose no greater liability upon the company than that which it has authorized and to which it has assented. He is notified and warned by the stockholders' resolution, incorporated in the instrument upon which he sues, that the company neither authorized nor assumed any liability for current interest beyond that imposed by an income obligation, *i. e.*, beyond the net earnings of the road. He is warned that the directors derived their authority and the express limitations of their powers in the premises from the corporate body; and that his bonds were executed and issued by the directors "*in pursuance of the power and authority conferred upon them by the stockholders.*" That power and authority could neither be misinterpreted nor disregarded. We insist that the bonds as issued were intended to, and when rightly construed, do carry out the precise purpose of the stockholders.

The company has done no act which can be construed into a ratification of, or acquiescence in, any liability with respect to these bonds inconsistent with their character as income obligations. It has proclaimed them to be obligations of this character from the date of their issue to the present time. Plaintiff had notice, in the clearest and most unequivocal language, of the nature of the company's liability. Plaintiff does not seek to enforce a liability which the company led him to believe it had assumed, and now attempts to evade. His claim has no such equities. On the contrary, he

seeks to enforce a pretended liability which the company warned and notified him, in unmistakable terms, that it did not assume. He designs that an ingenious reading of the letter of the bond shall extend the clearly defined limits of the company's engagement.

It should be borne in mind that the "option" reserved in the bond was simply an *additional advantage*, reserved by the directors, and in no manner affecting the liability of the company for interest in money. Such liability could (under the authority of the corporate resolution) only be incurred in case there were net earnings applicable thereto. Plaintiff's contention, as well as the judgment of the Circuit Court, is that the failure to exercise this additional privilege or "option" transforms the bond into a FIXED obligation, and deprives it of the properties of an "INCOME" obligation. *In other words, that the failure to exercise a privilege reserved by the directors, of their own motion, changes the obligation into one which is the exact antipode of that authorized and directed to be issued.*

It is not the claim of the defendant that, upon default of net earnings, the obligation to pay interest lapses, but that it merely rests in abeyance until other sources of payment, "provided in the mortgage," shall come into existence;—that is, (*a*) future net earnings sufficient to provide for such interest, or, (*b*) a sinking fund adequate for that purpose, or, (*c*) the proceeds of foreclosure at the maturity of the principal sum of the bonds; the bondholder retaining a right at all times to turn in his bond *with any interest accretions* in payment for the lands of the company. The company does not seek to, nor could it, escape liability for interest. Such

liability, at most, is merely postponed, and is fully secured.

THE PROVISIONS OF THE BOND ARE THOSE OF AN INCOME OBLIGATION AND NOT THOSE OF A FIXED OBLIGATION.

The formal structure of the bonds in suit was left to the discretion of the Directors; but the controlling consideration, the *nature* of the bond, was removed from the province of their discretion and fixed by the action of the corporate body. That action conferred no power upon the Directors to make an unconditional promise to pay current interest on these bonds. To infer such a power, or to imply such a promise, would do violence to the expressed intention of the corporation when it authorized and directed the issue of *income* bonds. An income bond containing an absolute and unconditional promise to pay interest, in any form, would be an impossible anomaly. It is a solecism—an absurdity. Such a promise would, *ipso facto*, transform the bond into a *fixed* obligation, and deprive it of the distinguishing characteristics of an *income* obligation. Such a promise could no more exist in an income bond than a condition robbing it of priority could exist in a first mortgage bond.

The bond in suit contains NO SUCH PROMISE.

The engagement of the company in respect of interest is as follows:

"The Texas and Pacific Railway Company hereby acknowledges itself to be indebted to
of or assigns in the sum of one thousand dollars, lawful money of the United States of

America, which sum the said company promises to pay to the said
or assigns, at the office of the company in the City of New York on the first day of January, A. D. (1915) one thousand nine hundred and fifteen, with interest thereon at the rate of seven per cent. per annum, payable annually on the first day of July in each year, AS PROVIDED IN THE MORTGAGE HEREINAFTER MENTIONED" (Record, p. 62).

The promise is to pay interest *in the manner provided in the mortgage*. It will be found upon a careful scrutiny of the mortgage, and of the bond (which is a part of the mortgage), that but two methods of *present* payment are provided. 1st. IN MONEY, *if the net earnings of the company are sufficient to* ENABLE *the company to pay its interest*. 2d. In scrip, if the company desires to issue it, upon a failure of net earnings.

The present right of the bondholders to interest is conditional upon the acquirement of net income, and is measured by the sufficiency of such income. But the company reserved a right to forestall accumulations of interest by an issue of scrip. This is the sole and exclusive office of the option or privilege reserved by the company. The plaintiffs' remarkable theory is that the company reserved an option to pay in money or in scrip *although the option can only arise when the company* HAS NO MONEY. He says the option is to pay in one of two mediums, although its *existence depends upon the* FAILURE OF ONE OF THE MEDIUMS. This is a solecism.

THE ONLY PRESENT SECURITY FOR CURRENT INTEREST IS ON THE NET INCOME.

IN THE OBSERVATIONS WHICH FOLLOW, we desire it to be borne in mind that it is not our contention that the character of the *security* given for the payment of the interest determines or fixes *per se* the *liability* in that

respect. The significance which should be attached to the nature of the *security*, and upon which we insist, arises from two considerations :

1. The security for current interest, being that appropriately and exclusively belonging to an income obligation, and all security pertaining to a fixed obligation for such interest having been withdrawn ; the plaintiff is affected with this additional notice of the liability assumed by the company, and these facts, in connection with the explicit notice afforded by the terms of the stockholders' resolution, put it beyond doubt that plaintiff is attempting to establish a liability which was never assumed.

2. The mortgage professing to secure these bonds "according to the tenor thereof" (Mtge., Art. 1) ; the security afforded cannot be without effect in determining the tenor of the bonds, *i. e.*, the scope and operation to be given to their provisions.

The provision of the bond is : "This bond has also as security for the interest a mortgage lien upon the *net income* of the said The Texas and Pacific Railway Company * * * after providing for the *operating expenses, the current repairs and reconstructions*, and the interest upon the first and second mortgage bonds."
Record, p. 62.

It will be observed that the mortgage provides for foreclosure on the lands and property only at *maturity* of the principal sum (Mtg., Arts. 5 and 6 ; Record, pp. 35, 36) ; that the proceeds of land sales cannot be diverted to the payment of current interest (Mtg., Art. 2; Record, p. 31), and that the net earnings are, hence, the only fund upon which the accruing interest is secured.

How idle it was thus clearly to define the limits of this security if there was a fixed personal liability, which would sweep not only the net earnings, but the fund so carefully reserved for operating expenses and current repairs and reconstructions! It is worth while to observe that the intent to preserve the fund for operating expenses, repairs and renewals intact and free from the claims of these bondholders is everywhere manifest. Evidence of that intention pervades the instrument. It was not intended in any event that these bondholders should have the power to threaten or impair the operation of the road—the source of the fund on which their security rested.

THE ONLY SOURCE OF CURRENT MONEY PAYMENT IS THE NET INCOME.

The bond contains the following provision, which has fed the ingenuity of plaintiff and which he has misconstrued into a basis for this suit:

"And in case such net earnings shall not, in any one year *be sufficient to* ENABLE *the company* to pay seven per cent. interest on the outstanding bonds then scrip may, at the option of the company, be issued for the interest."

Record, p. 62.

It is the defendant's claim that the office of the above provision is twofold.

a. It designates the net earnings as the only source of present money payment contemplated by the obligation of the company.

b. It reserves an option to issue scrip for interest

which would otherwise accumulate and become payable out of the further and future sources of payment provided in the mortgage.

THE OPTION IS NOT TO PAY IN SCRIP OR BORROWED MONEY.

In the event that the company shall be unable to pay its interests, in any one year, by reason of insufficient net earnings, it is provided that "scrip *may*, at the *option* of the company," be issued for the interest. The rule governing contracts for sums *payable in specific articles* has suggested the ingenious construction which plaintiff has placed upon this option. The only consideration which detracts from the ingenuity of his construction is the very remote probability of its soundness.

As the option can only arise upon the *failure of net earnings*, if plaintiff's theory is correct, and the company elects not to pay in scrip, it must *borrow* or subject its property to execution and sale.

His claim, that the promise to pay current interest in some form is unconditional (a claim set up in the face of an expressed condition), is the ground for his proposition that the company reserved an option to pay in scrip or borrowed money.

An option to borrow money to pay the interest on an income bond! A company which would reserve an option so absurd and ruinous would deserve the bankruptcy which must result from its careless exercise. The only case in which the company is entitled to pay in scrip is when there are not sufficient net earnings to enable it to pay in money; that is, when the failure of

earnings may be such as to render the fund for operating expenses and current repairs and renewals precarious, or perhaps even to threaten the fixed and prior charges. To suppose that under such, or even more favorable circumstances, the company would make an *unnecessary* addition to its liabilities, by borrowing money to pay interest which it might discharge in scrip, would be to credit the directors with a phenomenal capacity for mismanagement. It is impossible to conceive of any contingency in which the company would elect to pay its interest in borrowed money rather than in scrip. It is equally impossible to conceive that such was the option reserved.

THE COMPANY'S OBLIGATION HAS BEEN UNIFORMLY CONSTRUED BY THE COMPANY AND BY ITS BONDHOLDERS TO BE OF AN INCOME CHARACTER.

With the practical construction of this obligation—an unbroken current of construction running through many years—the plaintiff is intimately concerned. He is the holder of a *non-negotiable security* which he cannot divest of the incidents and relationship which determine its scope and operation, in aid of the letter of the bond.

Daniel on Negotiable Instruments (3d Ed.), p. 60, *et seq.*, and numerous cases there cited.
1 Parsons on Bills and Notes, p. 45.
Lawrence vs. Dougherty, 5 Yerg., 435.

The bonds were issued on the following dates, viz.: January 1, 1876, July 1, 1876, and July 1, 1877 (Record,

p. 46). NO INTEREST, EITHER IN MONEY OR SCRIP WAS PAID UPON THE BONDS DURING THE YEARS 1876, 1877, 1878 AND 1879 (Record, p. 49. Admitted allegation of answer, *ante*, p. 7. Found by Court to be true. Record, p. 64, fol. 114). In the year 1880, at the solicitation (not demand) of the bondholders, the company voluntarily issued scrip for the interest which had accumulated during the period included between January 1, 1876, and July 1, 1879. During that period the bondholders had displayed those virtues of patience and resignation which the holding of income bonds is so calculated to foster and develop.

Is it to be supposed that, having entered into a composition with the company, and having surrendered their old bonds upon the faith of the agreement expressed in the new, the bondholders would have patiently tolerated the failure of the company to pay in money or scrip, if they had supposed themselves entitled absolutely to payment in one medium or the other? This failure to enforce the rights, which plaintiff claims they had, cannot be explained upon the theory of forbearance in the interests of the company; because payment in scrip would have imposed no pecuniary liability upon the company. On the other hand, is it conceivable that the company having just been rescued by its convention with its creditors, from an imminent peril of foreclosure and bankruptcy, would have hastened to court a similar peril? If it had supposed itself liable for money or scrip, would it have invited the disaster and bankruptcy which it had just escaped by failing to issue scrip? Struggling under an almost intolerable burden of debt, would it have added an enormous sum to its

present liabilities by a wanton failure to save itself by the issue of scrip? The conclusion cannot be escaped that the parties *intended* the present liability for interest to be conditional upon net earnings and that the option to issue scrip was a privilege reserved to the company which it might or might not exercise—its non-exercise leaving the bondholders in no better position than that in which the failure of net earnings left them.

Thus have the original parties to the contract afforded us a practical construction of this obligation. And this construction was in the light of all the circumstances attending the issue of the obligation. *They* could not have been mistaken as to what was the intention of the parties; *they* were not ignorant of the understanding which prevailed in respect to the operation of the obligation. But after the lapse of a period of eight years the plaintiff in the present action propounds a novel theory of the charge and liability created by this issue of bonds. The acquiescence of the bondholders in a continued non-payment of interest in any form for a period of four years is scarcely the conduct or attitude of creditors holding obligations which they knew were immediately enforceable. It was reserved for the plaintiff, at this remote period from the date of these bonds, to acquaint the bondholders with their hitherto unsuspected rights, and to propound to the company a new theory of its obligation and liability. The Court will not fail to attach due importance to the practical construction of the parties to the contract. No better guide to the true intention of the parties than their own practical construction can be well suggested.

Mr. Justice NELSON said:

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, *the practical interpretation by the parties themselves is entitled to great, if not controlling, influence.* The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of law. But in an executory contract, *and where its execution necessarily involves a practical construction, if the minds of both parties concur,* there can be no great danger in the *adoption of it by the Court as the true one.*"

Sheldon vs. Chicago, 9 Wall., 50.

The same rule of construction was commended by NAPTON, J., in this language:

"As a written instrument means whatever the parties to it intend that it shall import, there is probably no safer guide to lead to its proper construction than the acts of the parties themselves. It will not do to look at the action of one party only, but of both; and if their conduct will consist with one construction, and is totally irreconcilable with another, there ought to be no hesitation in preferring that which the parties themselves have acted on and adopted, notwithstanding a different construction would more naturally be given to the language in which the agreement is written. The homely adage that 'actions speak louder than words' is just as applicable here as in the ordinary occurrences of daily life."

Price's Heirs vs. Evans, 26 Mo., 30.

If plaintiff construes this contract aright, we must conclude that the original bondholders "*builded better than they knew,*" and we may add, *better than the company knew.*

THE FOREGOING CONSIDERATIONS LEAD TO THESE CONCLUSIONS:

An *Income* bond was authorized by the corporate body. The directors professed to follow the instructions of the stockholders and to issue an income bond. Both parties to the contract practically construed the obligation as an income bond. The plaintiff had ample notice of the extent of the liability assumed by the company.

The plaintiff, to support his claim, necessarily denies that the directors followed the instructions of the corporate body; asserts that they issued an obligation other than that authorized; denies that they issued the obligation which they declared that they issued; and repudiates the practical construction of the original parties to the contract. The basis of his suit is the theory of a personal liability, as respects current interest, independent of, and beyond, the net income of the road. As such an obligation is at variance with the essential nature of an income bond, plaintiff says that the obligation in suit is not an income bond, that the corporate body which authorized it was deceived; that the directors who issued it practised a deception, and that its uniform construction by the investing public, during a period of many years, has been a persistent mistake.

A COMPARISON OF THE INCOME AND LAND GRANT BONDS AND MORTGAGE WITH THE LAND GRANT BONDS AND MORTGAGE OF 1872 (THE LATTER BEING RETIRED BY THE ISSUE OF THE FORMER), DEMONSTRATES THE CORRECTNESS OF DEFENDANTS' CONSTRUCTION.

The bonds in suit were issued for the primary pur-

pose of retiring the outstanding land grant bonds of 1872. This fact is disclosed in the mortgage securing plaintiff's bonds (and referred to in those bonds), and of the circumstances of the exchange the plaintiff cannot be deemed ignorant.

Caylus vs. N. Y. K. & S. R. R. Co., 10 Hun, 295.

He is affected with notice of the character of the outstanding bonds; and the most superficial comparison of those bonds, and the mortgage securing them, with the bond and mortgage in suit, will demonstrate the fact that the radical difference between the two is in respect to liability and security for current interest. In the latter issue of bonds the liability and security for such interest was reduced to the standard of the net earnings.

The *Income* and Land Grant bonds were issued for the purpose of retiring the land grant bonds of 1872 [Recitals of Mortgage Record, pp. 26, 27, 28]. An obligation of a different character from that of the outstanding security must have been issued or the change would have been without motive or purpose. When this readjustment was made the state of facts respecting the land grant bonds of 1872 was this:

These bonds were a fixed obligation. The liability to pay recurring interest installments was subject to no condition or qualification. The liability was enforceable through foreclosure, ample provisions for which were incorporated in the mortgage securing these bonds. The company was in default on numerous coupons [Record, pp. 47, 48; admitted allegations of

answer, *ante*, pp. 5, 6, found by Court to be true, Record, p. 64, fol.], and it had been demonstrated that the business of the road was inadequate to provide for the interest on this class of security. An imminent danger of foreclosure upon its lands compelled the company to seek some convention with the holders of these bonds; and it was in pursuance of an agreement with its bondholders that the company issued its *Income* and Land Grant Bonds in exchange for its simple Land Grant Bonds. In a transaction of this nature we may expect to find that there were mutual concessions made and reciprocal advantages secured. Such clearly was the case in the transaction we now consider. The bondholders surrendered a land grant bond—a fixed and peremptory obligation—and received in exchange an *Income* and Land Grant Bond. Thus the value of their bonds as respects liability and security for current interest, decreased with the addition to their title. Such was the concession made by the bondholders and the advantage acquired by the company. But, on the other hand, the advantages and concessions were thus equalized: While the bondholders had theretofore held an obligation secured only upon the *lands* of the company, they received, under the readjustment an obligation secured, not only upon the lands, but upon the net earnings of the railroad, and ultimately upon the road itself and all its appurtenances. They then held a security which, except as to the income feature, ranked as a first mortgage upon the lands and a third mortgage upon the road itself. To establish the fact that such were the ends intended to be accomplished by the readjustment, the light of extrinsic evidence is

not required. That fact is logically established by a comparison of the provisions respectively of the Income and Land Grant mortgage and the Land Grant mortgage [Record, pp. 47, 48].

The essential differences between the two obligations are these :

1. The old Land Grant bonds contained an absolute and unconditional promise to pay interest. The Income and Land Grant Bonds contain no such promise, but a promise to pay as provided in the mortgage, and the mortgage contains no provision for money payment except in case that the net earnings are sufficient therefor.

2. All provisions for enforcing payment of current interest, in case there are no net earnings, are omitted from the Income and Land Grant mortgage, though elaborately set forth in the old Land Grant mortgage.

The other points of difference are logical necessities involved in changing a fixed obligation into one of an income character. In all respects not touching this modification the obligation in suit is almost a verbatim copy of the old Land Grant obligation.

IF THE FOREGOING VIEWS *as to the nature and legal effect of the bond in suit* are correct, the plaintiff had no cause of action, his complaint stated none, and the judgment should have been arrested (Record, p, 65) or such judgment on the facts found should have been for the defendant.

We will now consider the case on the plaintiff's theory.

Case Considered on the Plaintiff's Theory.

If the defendant's construction of the obligation in suit is correct, the propositions and authorities to be hereafter presented have no application to this controversy. If the defendant has misconstrued its obligation, and if it is absolutely liable on the pleadings and facts found, for interest in money or in scrip, the cases below referred to are applicable for the purpose of showing:

1. That the claim of the plaintiff to a payment of his interest in cash must be perfected BY A DEMAND upon the company. The opinion and judgment of the Circuit Court to the contrary, are, we submit, erroneous, and the judgment should be wholly reversed. The company was not bound to seek the plaintiff and tender scrip to him in lieu of interest, and the opinion and judgment below to the contrary were, we submit, erroneous, and for this reason the judgment should be wholly reversed; or,

If an obligation rested upon the company to tender scrip upon the day fixed by the contract for payment of interest, then

2. The MEASURE OF DAMAGES is the market value of the scrip upon the day when it should have been tendered; that is at the date of the breach, and not the full or nominal sum of the interest money, as was erroneously adjudged by the Court below.

No inquiry, however, into either of these branches of

the case is necessary, unless the following propositions, necessarily involved in plaintiff's theory of his case, shall be adjudged and held by this Court to be sound.

1. That the term "income" in the title, and the provisions as to "net earnings" in the body of the bond are discarded as meaningless.

2. That the part of the stockholders' resolutions which authorized and directed the issue of an *income bond* was without force, significance or effect.

3. That the directors, while professing to follow the instructions of the corporate body, and to issue a security of the character authorized, in fact, defeated the intention of the stockholders by issuing a security precisely the reverse of that authorized, to wit, a *fixed* obligation.

4. That the directors, in full knowledge of the absolute and unconditional liability for interest imposed by this obligation, at a time when the company was in default and struggling under a prior fixed indebtedness for which its earnings were inadequate to provide, refused to pay interest in money, or to issue scrip for a period of four years *immediately following* the issue of these bonds; and thus courted the disaster and bankruptcy which the company had just escaped through a readjustment of its debts made in March, 1875 [Record, pp. 47–49].

5. That the original bondholders acquiesced in such non-payment of interest to which, on the

plaintiff's theory, they were absolutely entitled, either in scrip or money, for that period of four years, thus manifesting phenomenal ignorance of their rights, or phenomenal forbearance toward the company. [Record, p. 49.]

6. That the *uniform practical construction* of the obligation, until the agitation of this controversy, has been a persistent mistake.

7. That although the bonds and mortgage in suit were prepared at the same time as the first and consolidated mortgages of the company (in which were incorporated ample provisions for foreclosure on default in payment of current semi-annual interest coupons) [Record, pp. 47, 48.]; *the omission of provisions for foreclosure of current interest*, from the income and land grant mortgage, is of no controlling significance.

8. That, while the Income and Land Grant mortgage differs from the old land grant mortgage (retired by the execution of the former), in respect to the absence of such foreclosure provisions, there is no difference in the liability formerly imposed by the old bonds and now imposed by the bonds in suit; and hence the readjustment of the company's debt in this particular was without aim or purpose.

9. That the company while carefully guarding against foreclosure failed to protect itself against execution, thus avoiding Scylla to be engulfed in Charybdis.

10. That while the *security* for current interest is carefully limited to the *net income*, and postponed to the fund reserved for "operating expenses, current repairs and reconstructions," &c., the *liability* for such interest extends far beyond the net earnings, and may subordinate not only the fund reserved for operating expenses, &c., but every species of property pertaining to the road.

11. That the clause of the bond which measures the *ability* of the company to pay its interest, by the sufficiency of the net earnings; and by the clearest implication *designates the net earnings as the source of* payment, is to have no such operation as common sense must ascribe to it—especially when occurring in an obligation of this character.

12. That the option reserved by the company is not to forestall accumulations of interest by the issue of scrip; but is to pay in money or in scrip, although it is based upon the failure of money (*i. e.*, net earnings); that the option is to pay in one of two mediums, although *its existence depends upon the absence or failure of one of the mediums.*

13. That the Income and Land Grant mortgage, although professing to secure the bonds as to principal and interest, "*according to the* TENOR thereof," did not in fact so secure them—the only security for current interest being a mortgage lien on the net earnings; while if the "*tenor*" of the bonds imports a liability for such interest independent of, and beyond the net earnings, the secur-

ity for such interest is totally inadequate [Record, pp. 29, 30].

14. And generally, That the clear and manifest intention of the parties to the contract expressed in the bond in suit, as to the character of the obligation which was issued, may be defeated by a technical construction resting upon very improbable inferences.

The foregoing are propositions which logically result from plaintiff's erroneous construction of the obligation in controversy. Unless they receive the sanction of the Court we may close our investigations at this point.

WE SUBMIT, THEREFORE, THAT ON THE FACTS AS FOUND BY THE COURT BELOW, *the judgment ought to have been for the defendant, and we ask this Court so to adjudge.* Not being able to foresee the judgment of the Court on this point, we proceed, for the sake of precaution, to discuss the branches of the case which may become important if defendant errs in the construction of its obligation, and the plaintiff's theory, adopted by the Circuit Court, as to the nature and effect of that obligation is held to be correct.

II.

DEMAND. TENDER.

Even if this be not an income obligation, the Railway Company is not in default

until a demand by the plaintiff. The Company made a seasonable tender of scrip to the plaintiff and kept the tender good at the trial, as shown by the Court's findings of fact. (Record, pp. 63, 64.)

In this case the obligation rested on the plaintiff to make a demand at the office of the company. The Court below held otherwise (Opinion, pp. 59, 60. Findings, pp. 63, 64, 65)) and this is, we submit, erroneous. The obligation to make a demand results not only from the terms of the bond, which makes the interest payable in New York City (*vide* indorsement on bond); but also from the "character of the thing to be done" (Moore vs. Hudson River R. R., *post*, pp. 54, 55). The creditors of the company in respect to these bonds are scattered throughout the country, many of them unknown to the company and to its records (Record, p. 50). A tender by the company of scrip to the holders would be impracticable. It is the practice of the company, dictated by necessity, as well as provided for by contract, to require the recipient of its scrip to present himself (or his properly authorized agent), at its office and afford the company proper evidence of his title to scrip, as well as of his identity [Record, p. 50]. The company then issues scrip in lots to suit the requirement and request of the bondholder. Any other course of practice would be attended with embarrassing, if not insurmountable, difficulties. For these reasons an obligation to demand is implied from the very nature of the transaction to be performed.

It is the claim of the defendant that it could only be put in default by such a demand,—by a demand which

would have *satisfied all the requirements of "the thing to be done."*

For convenience we here repeat the 4th paragraph of defendant's amended answer, stipulated to be true in the agreed statement of facts, (Record, p. 58), and found by the Court in its findings of fact to be true [Record, p. 64].

"FOURTH. Defendant further alleges that its said income and land grant bonds are, as aforesaid, registered obligations; that interest thereupon is payable only to registered holders thereof or to their assignees by duly executed and acknowledged or authenticated order or assignment, at the office of defendant company, and upon the delivery by such registered holders, or their assignees by duly executed and authenticated order or assignment, of receipts for such interest; or, in case scrip is issued, of receipts for such scrip; *that by uniform and invariable practice from the first issue of scrip for said bonds, such bonds or such authenticated orders or assignments thereof are presented by the payee or registered holder or such assignee at the office of the defendant for scrip.* That when scrip is delivered thereon no indorsement is made upon the bond, but the receipt or voucher for such scrip so issued and received is signed by the person receiving the same *and the defendant cannot know to whom to issue or deliver scrip or who is entitled thereto, or who will receive the same until the said bonds or such assignments or orders are presented at its office as aforesaid and scrip demanded thereon, or unless the register holder, properly identified, presents himself at the office of the company and demands the issue of scrip.* And the defendant says, on information and belief (as in paragraph sixth, part I. hereof) *that the said plaintiff, in respect of the said interest sued for herein, never presented the said bonds and demanded or requested the issue of scrip for the years 1882 and 1883; but the defendant says that it has offered to deliver and is now ready to deliver scrip to the plaintiff for and in respect of the said bonds in suit, for the years 1882 and 1883, on the production of said bonds and the execution of the proper voucher or receipt for such scrip."*

We submit that the admission of the parties, and finding by the Court of these facts disposes of any possible basis for this suit, and the judgment in favor of the plaintiff was erroneous. If so, the plaintiff has no basis for his suit. As it is agreed and found that the plaintiff did not present himself at the office of the company, and did not make a demand, or give the company an opportunity to exercise its option, *of which it did not avail itself*, he is in no position to insist upon a forfeiture of the right to issue scrip, *for an omission to which he contributed*,—which, perhaps, he caused. The opinion and judgment of the Court below that no presentment or demand was necessary, is erroneous.

The following cases illustrate and establish the law to be contrary to the opinion and judgment of the Circuit Court :—

In Barker vs. Jones (8 N. H., 413) the action was on the following instrument :

"AMHERST, Oct. 26, 1830.

"I promise M. H. Barker the sum of $16 in one year from date, for a wood clock, *or* interest on the same and the clock uninjured.

"T. JONES."

PARKER, J. : "The first question is, *what was the place of the performance* of this contract? This is indicated by the place where it purports to have been made, and by the facts showing the residence of the parties. The contract was made at Amherst, where the defendant resided, the plaintiff living at the time in Massachusetts and afterward in Connecticut. It could not have been in the contemplation of either of them that the defendant was to deliver the clock in a different place from that in which he received it, and in a different government. It was not, then, to be performed at the residence of

the plaintiff. Nor could it have been intended that the defendant should carry the clock about with him, to deliver at such place as he might happen to meet the plaintiff. *The defendant was bound to perform at his own house. It must have been so understood.*

The *contract is not*, as it has been argued, a contract to pay sixteen dollars, with liberty to the defendant to rescind it and deliver the clock and pay the interest, but it is in the alternative. He has his election by the very terms of the contract.

It is incumbent on the *plaintiff to show a breach of the contract;* and this being its character, has the plaintiff offered any evidence of a breach of it? He has shown that he still holds the writing, and that is all. The defendant was not bound to seek him. *All that he was bound to do was to hold himself ready to make his election, and perform at his own house.* The plaintiff has not shown that the defendant was not so ready. He has shown no refusal, no neglect, no inability on the part of the defendant to perform. He has not proved any readiness on his own part to receive the money, or the clock, at the place of the performance; but without this readiness the defendant was not bound to do anything. *The defendant might well wait the plaintiff's demand;* and the plaintiff not having shown that he made a demand, or that the defendant was unable to comply with it had he done so, has shown no breach of the contract. It may be presumed that the defendant was ready at his house to comply with the terms of his contract, until there is some evidence to the contrary. *Judgment for the defendant.*"

In Wood vs. Sheehan (68 New York, 365), ALLEN, J., says: "The agreement is that in the event of his not having disposed of the mortgage on the *first day of May* next thereafter, he would deliver it or the note to Mrs. Sheehan, the defendant, so that after that day he should not hold both securities. He was not bound to tender the one security to the defendant in order to hold the other, and was not called upon to take any action, except *at the request of Mrs. Sheehan, the promisee.* The defendant *could have compelled an election on the day named*, and the surrender of one of the securities, but the plaintiff was *not in fault until a failure to elect*, and to comply with the agreement, *upon request made.*"

In the case next cited, the *absolute necessity* of *a* DEMAND, and its requisites in such a case as the present, are forcibly presented. The case, in all of its aspects, especially in *respect to demand, and equality of value in mediums of payment*, has an especial bearing upon the case at bar.

Moore vs. Hudson River R. R. Co., 12 Barb., 156. The opinon of the Court may be set out, practically in full.

BY THE COURT, BARCULO, J.: "The only part of this case we deem it important to examine particularly is the effect of the stipulation by the contractors to receive a portion of their compensation in the stock of the company at its par value. In all other respects we think the report of the Referee must stand.

It appears that the original contractors, Wright, Mallory and Smith, agreed to do the work on two sections of the defendant's road, and were to be paid *in the stock of the company* at its par value, to the extent of twenty per cent. on one section and ten per cent. on the other. At the date of the contract the stock was worth fifty-four per cent.; and at the commencement of the suit in April, 1879, it was worth fifty-nine per cent.

The plaintiff who has become the assignee of the contracts from Wright, Mallory and Smith, now *refuses to receive the stock in payment, and demands the whole amount of its par value in money;* which claim he bases upon the grounds:

1. *That the defendant did not seek him* and *tender the stock* ON THE DAY. He endeavors to bring himself within the principle applied to agreements to pay in SPECIFIC ARTICLES, which the party agreeing to pay *is bound to tender* (Lamb vs. Lathrop, 13 Wend., 95. Goodwin vs. Holbrook, 4 *Id.*, 377. Sheldon vs. Skinner, 4 *Id.*, 525. Lafarge vs. Rikert, 5 *Id.*, 187. Lobdell vs. Hopkins, 5 Cowen, 516). After a careful consideration of the foregoing and numerous other cases, we are of opinion that the principle running through them has no application to the present case. This is *not* an agreement to pay a certain sum in *specific articles. It is an agreement to receive payment* IN A DEPRECIATED CURRENCY—IN STOCKS KNOWN TO BE MUCH BELOW PAR. The con-

tract was undoubtedly made, and the prices fixed with direct reference to the medium of payment; *and we are unable to discover any principle of equity or law which can entitle the plaintiff to recover nearly double the value stipulated for, by reason of the non-delivery of the stock on the day.* In *all* the cases where the plaintiff has been allowed to recover the whole amount in money, because the articles were not tendered, *the agreement contemplated property of* EQUAL VALUE WITH THE SUM TO BE PAID. The medium of payment [*i. e.*, in specific articles or chattels] was selected for the convenience of the debtor; and if he failed to avail himself of the arrangement made for his accommodation, *no injustice could be done by exacting the sum in money.* But the case before us is easily distinguishable from those; and we think that *the defendants were not bound, for this reason, to seek the plaintiff and tender the stock.*

But even according to the cases on this subject above cited, *it is not always incumbent on the obligor to make a tender. It is frequently necessary for the creditor to make a demand before his action can be maintained.* Thus, where a merchant gives a due-bill, payable in goods, the holder must present his claim at the store where the articles are. So of a mechanic's obligation to pay in work. So an agreement to pay in *farm produce* has been held to impose upon the creditor the duty of demanding payment at the farm of his debtor (5 Cowen, 516). All that is required of the obligor in such cases is that he should be ready at the place. This rule arises from the nature of the contract itself. The place of performance is not expressed, but is *implied* from the character of the thing to be done. Tested by this rule, the contractors would be bound to PRESENT THEMSELVES AT THE OFFICE OF THE COMPANY TO RECEIVE THE STOCK AT THE HANDS OF THE PROPER OFFICERS, WHOSE DUTIES REQUIRE THEM TO MAKE THE NECESSARY ENTRIES IN THE BOOKS, AND FURNISH TO THE STOCKHOLDERS THE APPROPRIATE WRITTEN EVIDENCE OF THEIR RIGHTS AND INTERESTS. This we consider fairly, if not necessarily, inferable from the terms of the contract. * * *

The Referees erred, therefore, in allowing the plaintiffs to recover for the stock, and the judgment entered upon the report must be reversed *pro tanto*, and affirmed as to the residue, with a readjustment of costs and percentage."

Moreover, the contract, with which we are now dealing, prescribes *no time for the issue of scrip.* It is silent upon this subject. It is true, plaintiff *infers*, and the Court so held, that if scrip is issued, it must be issued *on the day* on which interest is payable. There is no ground for this inference. On the contrary, the *nature of the case* is such as to demonstrate that it could, *not* have been intended that scrip should be issued on the precise day. This, without more, shows that the opinion and judgment below are erroneous. The answer alleges that net earnings for the preceding year ending June 30, *cannot possibly be ascertained by July 1st* [Record, p. 47]; and this is obviously true.

Scrip is to be issued not *as* interest, but may at the option of the company be issued in *lieu* of interest—"for such interest." No issue of scrip would conclude the bondholders not receiving it—should it be discovered when the full returns of traffic come in (viz.: some weeks or months after the expiration of the year)—that the net earnings had been sufficient to enable the company to pay in money. An *estimate* of earnings must always be made if the company is to prepare itself for an issue of scrip on the precise day. But the company cannot be compelled to make such an estimate, nor are the bondholders obliged to submit to such estimate. Neither party would be bound by a "proximate estimate." Hence, both parties are entitled to absolute certainty.

Penna. Coal Co. vs. Del. & Hudson Canal Co., 29 Barb., 588.

Whatever may have been the purpose of the omission, certain it is that no time was prescribed by the

contract for the issue of scrip, and it is equally certain that had a precise day been designated, before full returns of traffic could be ascertained, the results of a mistaken estimate of earnings would be complicated and embarrassing. Plaintiff's inference, (and the Circuit Court's opinion and judgment), as to the *precise day* on which scrip must be issued, is the less entitled to favor and judicial sanction, in that it is urged for the purpose of effecting a *forfeiture* of a valuable right.

"THERE IS NO TIME FIXED for the last alternative, and it follows that it must be done ON REQUEST."

Manuel vs. Holdredge, 45 N. Y., 151.

It is a rule of law well settled that where *no precise and definite time for performance* is expressed, a *demand* is necessary in order to put the promisor in default.

"If the contract specify a *place* in which articles shall be delivered, *but not a* TIME, *this means that they are deliverable* ON DEMAND; but the demand must be sufficient to enable the promisor to have the articles at the appointed place with reasonable convenience."

2 Parsons on Contr., 661.

Inasmuch as the company tendered or offered, as alleged in the answer, and found by the Court (Record, pp. 50, 63, 64), scrip to the plaintiff *before any demand on his part*, and as the company responded to his demand *by a prompt offer of scrip*, it is clear that it cannot be held to be in default. The tender of scrip was kept good at the trial (Record, p. 64, fol. 113). The company has performed its full duty, and the judgment should have been in its favor.

But even though the defendant were mistaken as to the construction of the bond in suit, and even though an obligation rested upon the company to hunt up its widely scattered creditors and tender them scrip; the *rule as to options* which the plaintiff endeavors to apply to this case has no application whatever.

1. Because, as before shown, this is *not* a case of an optional contract.

2. If it were, the mediums of payment are of *unequal value.*

III.

The rule invoked by plaintiffs and adopted by the Circuit Court, as to the measure of damages, applies only to cases where the alternative mediums of payment are of a supposed equal value. It was erroneously applied by the Circuit Court to this case.

It will be found, upon an examination of the cases, that this proposition holds good in either of the following cases:

1st. Where a sum certain is payable in *specific articles*, of a *value less* than the sum mentioned.

2d. Where a sum certain is payable *in specific notes*, bank bills, railroad stock, or SCRIP or other paper of *less value* than specie.

3d. Where there is an *express option* between two mediums of payment, one of which is known to be of a value inferior to that of the other.

The Circuit Court held that the failure to exercise the option to issue scrip on the precise day made the company liable to pay, not the value of the scrip, but the full nominal or par amount of the debt in money (Record, pp. 60, 64, 65).

To constitute an option to which the rule adopted by the Circuit Court would apply, the choice must be between two methods of payment of a supposed *equal* value, and not, as in the case at bar, a right to pay in a vastly inferior article *contingent upon the failure of the primary medium of payment.* This principle runs through all the decisions. There is nothing inequitable in holding a debtor to one of two presumably *equal mediums* of payment, in case he fails to elect to pay in the other. But if one medium is of a known *inferior value*, and the debtor, through some technical default is held to payment in the other, he loses a substantial right capable of valuation in money, and is subjected to what is in essence a forfeiture or penalty. And such is the effect of the judgment of the Court below. We find this element of *equality of value in the mediums of payment* running through all the cases of options cited by plaintiff, or similar to those cited by him. For instance:

"For the main claim in this case interest was allowed by the Referee only from the 15th of April, 1854, when for all work done under the contract he was entitled to interest from the 1st of January previous, as he was to be paid in cash, or notes equivalent to cash, *of course*, which could only be by adding the interest or making them payable with interest, cash and

notes being merely two modes of payment, and not intended to indicate *articles of different value*, because in such case *there could be no doubt as to the choice.*"

Stuart vs. Binsse, 10 Bosw., 445.

"In all the cases where the plaintiff has been allowed to recover the whole amount in money, because the articles were not tendered, the agreement contemplated property of EQUAL *value with the sum to be paid.* The medium of payment was selected for the *convenience* of the debtor; and, if he failed to avail himself of the arrangement made for his accommodation, *no injustice could be done* by exacting the sum in money."

Moore vs. Hudson R. R. R. (*ante*, pp. 54, 55).

The judgment of the Circuit Court makes the defendant pay the plaintiff twice the value of the scrip.

[Record, pp. 64, 65.]

NOT A CONTRACT TO PAY IN SPECIFIC ARTICLES.

Cases of Contracts to Pay in Specific Articles distinguished from the case at the bar.

THERE IS A RULE OF LAW, resting upon a very respectable (though not unbroken) line of authorities, to this effect: The measure of damages, in case of default, upon a note for a sum certain *payable in specific articles*, at a fixed date, is the *sum of money mentioned in the obligation*, and the debtor must (in general) set apart and tender the articles at the day, or pay the amount in money. The reason is stated to be this: In such cases *the promise is to pay* SO MUCH OR SO MANY *of the specific articles* AS WILL AMOUNT IN VALUE *to the sum of money expressed in the obligation.* No other sum could

afford the measure of damages upon such contracts, because they require the payment of specific articles *to be worth such sum*. Of this nature are the following cases cited below by plaintiff:

Pinney vs. Gleason, 5 Wend., 393.
Gilbert vs. Danforth, 6 N. Y., 585.
Mettler vs. Moore, 1 Blackf., 342.
Church vs. Feterowe, 2 Pen. & W., 301.
Smith vs. Smith, 2 Johns., 235.
Heywood vs. Heywood, 42 Me., 229.
Crandall vs. Bradley, 7 Wend., 311.
Laxton vs. Johnson, 10 Johns., 418.
Fletcher vs. Derrickson, 3 Bos., 181,

And numerous other cases cited by plaintiff.

THIS RULE HAS NO APPLICATION to the case at bar, as this is not the case of an obligation payable in *specific articles*.

ANOTHER RULE rests upon a line of authorities as respectable (and perhaps more uniform), and is grounded, no less firmly, in reason. The rule is this: Upon obligations for a sum certain payable, on a day certain, *in the notes of a particular bank, in the bonds of a particular State, in railroad stock, in railroad scrip*, or in short, in any paper *capable of numerical valuation*, the debtor is not obliged to set apart or tender at the day, and the measure of damages, on default in payment, is *the value of the paper at the time it should have been paid*. The reason of this rule is stated to be that:

"When a party engages to pay so many dollars in bank notes, *stock or scrip*, the articles are *described* and *numerically calculated by the number they express*, so that three hundred dollars in railroad stock or bank notes is understood to mean that amount, *as expressed upon the face of the stock or notes, and not an amount*

which will be equivalent in value to three hundred dollars *in money.*"

Noonan vs. Ilsley, 17 Wis., 314.

Now, it is obvious that the case at bar, if it comes within the operation of either of these rules, must be controlled by the rule last stated. It will not be contended that, in case the company issues scrip, it must issue it to an amount, which will be "*equivalent in* VALUE" to the interest if paid in *money;* but it will be readily admitted that the scrip is to *correspond with* the amount of interest, in respect to "*the amount expressed upon the face of the scrip.*" Thus, the *actual value* of $1,000 *in scrip* may bear no relation of value to $1,000 of interest *in money;* and in the present case, owing to the fact that scrip can only be issued when the company has no sufficient net income, the disparity of value between such scrip and money must always necessarily be great, and the answer so alleges. And the agreed statement shows the actual market value of the scrip at different dates. (Record, p. 50; Agreed Statement Record, pp. 57, 58.) And the Court so finds. (Record, p. 64.)

Notes Payable in Bank Paper.

The contract in Anderson vs. Ewing, 3 Litt., 245, was as follows:

"For value received I bind myself, heirs, &c., to pay to Thomas Bryan, or assigns, $800, on or before the 1st day of September, 1820, *in such bank notes as are received in deposit at that time in the Hopkinsville Branch Bank.*

Whereof, I have hereunto set my hand and seal this 12th day of March, 1819.

(Signed) JNO. S. ANDERSON. [SEAL.]

The Court said:

"It is true, an instrument drawn, stipulating the payment of a certain number of dollars in cattle, wheat, *or other commodities*, is construed to mean so much of these articles as will amount to that sum in specie. *But the reason of this is evident.* The commodities themselves *cannot be counted by dollars*, as that name is never applied to them. But this is not the case with bank notes. They engage to pay so many dollars, and are *numerically calculated by the numbers they express*, so that the expression, "eight hundred dollars in bank paper," is universally understood to mean that much money, when the numbers expressed on the face of the notes are added together, and not as including so many more, superadded, as will make them equal to eight hundred dollars in specie.

"This being settled as the meaning of this note, the remaining question will be, as it is presumable the bank alluded to would and did take, at the time, when offered, notes that were above or equal to par in specie, as well as those which were below it, in which kind was the defendant bound to pay on the day stipulated? *It is a rule in such covenants, where the person bound to pay* HAS HIS ELECTION TO DISCHARGE THE DEMAND IN ARTICLES EITHER OF GREATER OR LESS VALUE OR QUALITY, THE LATTER IS TAKEN AS THE PROPER CRITERION OF DAMAGES *sustained by a breach of the stipulation*, as was held by this Court in the case of *Pope vs. Campbell*, Hard., 31. Of course the notes *lowest in value* on the day, ought, in this case to be taken. It, then, clearly follows that the defendant ought to have been at liberty to show what was the real value in specie of such notes, on the day of payment, as the demand against him was about to be liquidated in specie."

In Gordon vs. Parker, 2 Smedes & M., 485, the promise was as follows:

"$5,000 due George L. Smith, or bearer, five thousand dollars *payable in Brandon money*. Jackson, January 26th, 1839.

N. C. GORDON."

[The arguments of counsel for plaintiff in error are elaborately presented, and in them the authorities upon

the measure of damages on such contracts are carefully collected.]

THACHER, J., said: "The declaration contained an averment that the term *Brandon money* meant the notes of the Bank of the Mississippi and Alabama Railroad Company at Brandon, Mississippi. The defendant below requested the Court to charge the jury that the measure of damages in the case was the specie value of the Brandon Bank paper at the maturity of the due-bill, with interest, which charge the Court refused to give. We see nothing in the other errors assigned which calls for our consideration. The contract was to pay in a certain species of bank notes, and their value at the time of the date of the due-bill should have been ascertained by the assessment of the jury as the measure of damages, together with interest. This was so decided by this Court in the case of *Samuel Bonnell vs. Covington and Winston*, January term, 1843. That action was founded upon a note payable *in the current notes of either of the Banks of Natchez or of the Union Bank.* The Court there say: 'If there was any difference between the current notes of those banks, if there were any such, and specie, it may be estimated by the jury and the defendants allowed the benefit of such difference. Their verdict must be for the value of the current notes in specie, at the time payment should have been made.'"

In *Sedgwick on Measure of Damages*, at page 511, Vol. 1, it is said:

"In Tennessee it has been decided that the measure of damages for breach of a covenant to pay a given sum in a particular species of paper, as Tennessee, Alabama or Mississippi bank notes, is the specie value of such notes, according as it would be for the interest of the covenantor to discharge the obligation; the Court saying: 'manifestly on the day the payment was to be made, the covenantor *might have discharged himself by the payment of one hundred dollars, in paper of either description described in the covenant; of course he might have selected the* LEAST VALUABLE BANK NOTES MENTIONED. If he failed to pay, and broke his covenant, *what injury did the covenantee sustain thereby? Certainty, only the value in money of the article in which payment might*

have been made. As the measure of damages in covenant consists in the *value to the covenantee of the thing required to be performed at the time of the breach,* the damages in this case must be the specie value of the notes in which payment MIGHT HAVE BEEN MADE, AND IN WHICH IT WOULD HAVE BEEN MOST TO THE INTEREST OF THE COVENANTOR TO HAVE PAID.'" The learned author adds, "I confess this seems to me the most correct view of contracts of this description."

The case cited by Sedgwick (*supra*) was Hixon vs. Hixon, 7 Humph., 33; GREEN, J. (the same Judge who decided Miller vs. McLean, 10 Yerg., 245; cited by plaintiff in his brief below).

THE SAME RULE WAS applied in each of the following cases:

Phelps vs. Riley, 3 Conn., 266 [where the note in suit read thus:

"* * * sixty days after date we promise to pay Dorcas Phelps eighty-eight dollars in *current bank bills,* such as pass in Norfolk between man and man, with interest; as witness our hands; value received."

(signature.)]

Eason vs. Abernathy [where the obligation was to pay $500 in notes on *Bank of Tenneesee, old issue*].

Dillard vs. Evans, 4 Pike (Ark.), 175 [where the note was payable in the "*common currency of Arkansas*"].

Obligations Payable in Notes, &c.

In Williams vs. Sims, 22 Ala., 512, the suit was on this note:

Due on the first day of January, 1852, Thomas Sims twenty-six dollars, *to be paid in solvent notes and accounts of other men.* November 13, 1851.

(Signed)

JAMES O. WILLIAMS."

PHELAN, J.: "The charge was erroneous in another particular. The Court instructed the jury 'that if solvent notes or accounts on other persons' had been demanded at the proper time and defendant failed or refused to deliver them, the plaintiff was entitled to 'recover the amount of the note with interest,' &c.

"A note for a certain sum 'to be paid' or payable—the terms are convertible—'in solvent notes or accounts of other men,' is not equivalent to a note payable in money, as this charge supposes it to be. Nor do these words indicate simply that the maker has the right, as a condition inserted for his benefit, to pay at maturity or before the full sum expressed in the note in such 'solvent notes and accounts' estimated in money. But the contract of the maker in such a note is to pay the sum expressed in the note, dollar for dollar, in 'solvent notes and accounts of other men' at or before maturity or the value in money of that amount of such 'solvent notes and accounts' at the time of the maturity of the note, if paid after maturity. In an action on such a note it is necessary to aver and prove, or, in case of appeal, to prove at least the value in money of 'solvent notes and accounts' of individuals at the time of the maturity of the note. The difference between the value of such notes and accounts and money—gold or silver coin—may not be very great; it may, in fact, be a mere trifle. Still, they are not money nor equivalent to money, and, therefore, the charge of the Court to the jury, under the proof, that they must find for the plaintiff the amount of the note, was erroneous."

The same rule was applied in the case of Wilson vs. Jones, 8 Ala., 536, where the action was in assumpsit to recover the full sum of money upon a note promising to pay $3,560.15 for value received, payable in *Alabama Bank or branch notes.*

In *Marris' Adm'r. vs. Prather*, 3 Ky., 196, action was brought on the following instrument:

"[Date.]

"Due P. S. Jones *$3,000 in cash notes*, last payment on lots Nos. 218 and 234, in town of Old Hickman,

known as the property on which the Burns warehouse stands.

" [Signature.]"

Judge DUVALL says (at p. 197): " The amount which the plaintiff was entitled to recover upon the instrument sued on was the *value of the cash notes* at the time they ought, by the terms of the contract, to have been paid, to which might have been added, by way of additional damages, interest on such value from the time indicated."

In *Sirlott vs. Tandy*, 3 Dana, 142, it was held that the sum to be recovered on an obligation payable *in notes* is their value when they ought to have been delivered.

Ch. J. ROBERTSON saying: " There can be no doubt that the value of the notes at the time when they were to be paid or assigned was the legal criterion of recovery."

So in *Williams vs. Jones*, 12 Ind., 561, and *Pierce vs. Spader*, 13 Ind., 458; in which cases the notes in suit were for sums certain, payable in "*notes*" and "*judgments*" respectively, "*on solvent men.*"

Obligations Payable in Confederate Currency or Bonds, &c.

In *Powe's Adm'rs vs. Powe*, 42 Ala., 113, it was held by the Court, Ch. J. WALKER delivering the opinion, that

"If the understanding or agreement of the parties that the plaintiff's note should be discharged in *confederate currency* be found by the jury, the measure of the plaintiff's recovery would be the value of the stipulated amount or sum of such currency at the time of

maturity, and if it was of no value at that time, the plaintiff would only recover nominal damages."

In Doak vs. Exr's of Snapp, 1 Coldw., 180, contract in suit was this:

"For and in consideration of Georgia State Bonds amounting to $2,250, in the hands of Saml. S. M. Doak, this day ordered to me by Saml. Snapp, I, Saml. M. Doak, promise to pay to the said Snapp interest on said bonds, at the rate of six per cent. in half yearly payments from this date, and *I moreover promise to pay on or before the 5th of April, 1845, to the said Snapp or order, $2,250 in Georgia State bonds, or their equivalent in other* money."

CARUTHERS, J. "The chancellor decreed that there was no usury in the transaction, and that as the Georgia bonds were not paid on the 5th of April, 1845, Snapp was entitled, under the covenant to their equivalent in money; that is, what such bonds would have commanded in cash, in the principal markets in the United States for such stocks. * * * It was a sale of stocks to be repaid in kind, or, if not, whatever such stocks might be worth at that time—not their nominal amount."

The reason of applying a different rule of measuring damages to cases where the promise is to pay a sum in obligations "*in the similitude of dollars;*" from that which is applied where the sum is to be paid in articles not susceptible of such numerical valuation; is well presented by Judge BLACKFORD delivering the opinion of the Court, in Van Vleet vs. Adair, 1 Blackf., 346. The action was on a covenant.

"For the payment of a certain sum, one-half in specie, and the other *in bankable paper.*"

The Court said:

"This case is different from that of *Mettler and Smith vs. Moore*, decided at this Term (1 Blackford, p. 342, opinion by BLACKFORD, J.). There the obligation was

for the payment of *a certain sum in whiskey*; here, for the payment of a certain sum in *bankable paper*. In the former whiskey was to be delivered TO THE VALUE OF THE SUM MENTIONED; in the latter, bankable paper NOT *to the value of the sum mentioned*, but, COUNTING THE FACE OF THE BANK NOTES, *that sum in dollars*. In the former the plaintiff was entitled at least *to the amount stated in the obligation*; in the latter, as respects the part to be paid in paper, *only to the value of bankable notes*, COUNTING ON THEIR FACE THE SUM IN THE OBLIGATION MENTIONED, *which value might be considerably less than the nominal amount*."

Obligations payable in railroad stock and scrip.

In Parks vs. Marshall (10 Ind., 20), the suit was on the following note:

"$400. Twelve months after date I promise to pay John M. Wallace *four hundred dollars in M. & V. Railroad scrip*, without any relief from valuation or appraisement laws." (Signed by the defendant Marshall).

STUART, J.: "There was a jury trial—verdict and judgment for the plaintiff for $249. Parks moved for a new trial and appeals.

The measure of damages upon this note is the only question in the case. The Court instructed the jury that the value of the scrip at the time the note became due was the measure of the plaintiff's damages. Was this instruction correct? There are several cases in our reports bearing on this question. Let us first ascertain as nearly as we can how the several contracts were worded.

In Coldren vs. Miller, 1 Blackf., 296, the notes were payable in current bank paper; and the value of such paper was held the measure of damages. The same doctrine was held in Van Vliet vs. Adair, 1 Black., 346. So upon a note for thirty dollars of canal money. Columbia vs. Amos, 5 Ind. R., 184. In Mettler vs. Moore (1 Blackf., 342), the covenant was for $125 in whiskey, to be delivered at a particular place. *Held*, upon de-

fault the plaintiff was entitled to the face of the note and interest, * * *

"In the cases cited from 1 Blackf. and 5 Ind. R., *supra*, the bank paper and canal scrip were an issue authorized by law, and passing conventionally as money. Had this species of currency been tendered at the maturity of the notes, it would have satisfied their terms. Of course the value of such paper currency at the maturity of the notes was the measure of damages.

"But in the case at bar the issues of railroad scrip had no such conventional value. The issue of such scrip was wholly outside the purposes of the corporation, and unauthorized by law. At best it could only be regarded as the promissory notes of the company—not to be distinguished from the notes of individuals. * * *

"Upon the whole, the majority of the Court are inclined to hold the note in this case payable in scrip, and that in case of failure the measure of damages was the market value of scrip at the time.

" * * * * In EDWARDS ON BILLS AND PROMISSORY NOTES, 723, the adjudications of several of the States, on notes payable in *specific articles*, are collected. But in relation to *cases like that at bar*, where the article to be paid is bank notes, or *scrip in similitude of bank notes*, the author says: 'There is a class of cases in which the rule as held in some of the States [viz., the sum named in the note as the measure of damages] might, *if applicable, operate unjustly towards the party in default;* as where a note is made payable in greatly depreciated bank bills being given for twice or three times the amount of the debt due. * * * When a party gives his note, payable in depreciated currency, he declares in substance that the nominal amount is not the true amount due."

In Noonan vs. Ilsley, 17 Wis., 314, the action was on the following due bill:

"Due to Josiah A. Noonan three hundred dollars in *Watertown Railroad stock.*

Milwaukee, March 22, 1856.

CHARLES F. ILSLEY."

COLE, J.: "The defendant below requested the Court to instruct the jury that the measure of damages for failure to deliver the stock was the value of the stock at the time of such failure, and interest. The Court refused to give this instruction, but told the jury that the plaintiff was entitled to recover the sum of $300, with legal interest from the time of such demand, less the nominal damages to which the defeudant was entitled by reason of the breach of the covenant against incumbrances and seizin. * * * The question is, whether the amount of money mentioned in the note, with interest, is the proper measure of damages, or the price of railroad stock of the nominal value of three hundred dollars, at the time of the breach of the contract. * * *

"In this State we have no decisions upon the point, and therefore are at liberty to adopt the construction which we think will most fully effectuate the intention of the parties. And according to our construction of the instrument, the respondent agreed and is bound to pay so many dollars in the stock of the company as, when counted at par, will amount to three hundred dollars. If the stock is appreciated above par, the payee is to be benefited by the increased value; and if depreciated, he is then to be restricted to three hundred dollars in amount, although worth less than the sum of money. The authorities above cited abundantly show that when the instrument, like the one at bar, is to be *paid in bank notes, or in stock or scrip in the similitude of bank notes*, then the market value of the notes, stock or scrip is the measure of damages. And the reason given for the rule is, that when a party engages to pay so many dollars in bank notes, stock or scrip, *the articles are described and numerically calculated by the number they express*, so that three hundred dollars in railroad stock or bank notes is understood to mean that amount as *expressed upon the face of the stock or notes, and not an amount which will be equivalent in value to three hundred dollars in money;* while an instrument drawn for the payment of so many dollars *in chattels*—wheat, salt, cloth, wool and other like articles—is construed to mean so much of those things *as will amount to the sum in money*, because the things themselves cannot be counted by dollars, as the name is never applied to them. And this explains why this instrument was

drawn in the manner it was; because three hundred dollars of stock is understood to mean that number of dollars as expressed upon the face of the certificate. See also Sedgwick on the Meas. of Damages, Chap 8, p. 253 (3d Ed.). We universally speak of so many dollars of railroad stock without any reference to its actual cash value, because it is convenient to count and describe in this manner.

"For these reasons we think the order of the Circuit Court granting a new trial was correct and must be affirmed."

In Porter vs. Buckfield Branch Railroad, 32 Maine, 539 (reported also in 1 Am. Ry. Cas., 185), the action was upon a railroad construction contract wherein it was provided that the contractors were

"to receive fifteen per cent. of the total amount ($40,000) on their contract *in the capital stock of said company.*"

The stock was demanded, but was not delivered. The question presented to the Court was whether the plaintiffs became entitled, through such default, to recover the *nominal value* of the stock. It was held that the measure of damages was not its *par* or *nominal* value, but its *marketable value*, the Court saying:

"The measure of damages, then, will be $6,825.85, and the value of seventy-three shares of stock thus circumstanced, with interest from the date of the demand, proved. Any other rule would cast upon the defendants a burden not imposed by the award, and wholly inconsistent with the terms and spirit of the contract upon which the award was to be based, and upon which it was in fact made."

In Alexander & Tysen vs. Macaulay's Admr., 6 Md., 360, the action related to a part of an agreement whereby it was declared that $2,500 of a gross sum should be paid by a transfer of stock. The market value of the

stock at the day it should have been paid was held to be the measure of recovery.

So in Orange, &c., R. R. Co. vs. Placide, 17 Gratt., 366, where the action was upon a construction contract, under which a percentage of the amount to be paid was to be discharged in stock.

The important case of Moore vs. Hudson River R. R. Co. (12 Barb., 156) is set forth substantially in full at pages 54, 55 of this brief, where it is considered with reference to the subject of DEMAND. It will be remembered that in this case railroad contractors had agreed to take a part of their pay in the *stock of the company.* Upon the theory that the company was in default by reason of a failure to *tender the stock on the precise day,* the contractors brought suit for its full nominal value. In an able and convincing opinion, the case was distinguished from those arising upon contracts to pay certain sums in *specific articles.* That case is as applicable to the controversy at bar in respect to the considerations now being presented as it is in respect to the questions of demand and tender and the equality between mediums of payment, which must exist where the plaintiff's rule is to be applied.

Therefore, we repeat, where the *specific medium of payment is bank notes, or stock or scrip or any paper susceptible of numerical valuation,* there is no reason for applying the rule that the full nominal sum of the obligation is the measure of recovery, and in such cases the rule is not applied.

THE DOCTRINE for which we contend is also that of this Court.

Rives vs. Duke, 105 U. S., 132.
Thorington vs. Smith, 8 Wall., 1.

The Confederate Note Case, 19 Wall., 548.
Wilmington and W. R. R. Co. vs. King, 91 U. S., 3.
Robinson vs. Nobles Adams, 8 Pet., 181.

In the case last cited (8 Pet., 181), the obligation was to be discharged in a depreciated medium—*the notes of the Miami Exporting Company.* [See the instructions given and refused.] Their *cash value*, not their *nominal* value, at the maturity of the obligation was held to be the measure of recovery, disposing of the claim to recover the nominal value of the notes, in this language:

"The law affixes no such penalty for default of payment. Robinson can only be held to make good the damages sustained through his default, and the specie value of the notes at the time they should have been paid is the rule by which such damages are to be estimated."

Alternative Mediums of Payment.

The following cases are cited for the purpose of anticipating any claim which the plaintiff may make that the assumed *alternative character* of the contract in the present case renders the cases we have cited inapplicable. Of course, in order to make this claim, he must, *ex necessitate*, admit that the numerous cases *cited by him below*, of contracts to pay certain sums IN *specific articles* have no application to the case at bar.

IT *is an unqualified and uniform rule* that, where a debtor acquires a right, either under the original operation of the contract, or by the happening of a contingency provided for in the contract, to pay in a medium of a value known to the parties to be inferior to the

nominal sum of the obligation, *a default of payment is compensated by awarding the value of the inferior medium on the day when payment should have been made.*

In a case where the debtor has the choice of several mediums of payment, the measure of the damages will be the value of the medium "in which payment *might have been made and in which it would have been* MOST TO THE INTEREST OF THE COVENANTOR TO HAVE PAID."

Hixon vs. Hixon, 7 Humph., 33 (*ante*, p. 65).

Anderson vs. Ewing, 3 Litt., 245 (*ante*, pp. 62, 63).

1 Sedg. on Meas. Dam., 511 (*ante*, pp. 64, 65).

If the mediums of payment are of a *known unequal value*, and if, by the happening of a contingency provided for in the contract, the debtor secures the absolute right to pay in the medium of inferior value, the *forfeiture* of that right, by limiting him to the more valuable medium, is the imposition of a penalty. The penalty sought to be imposed on the company in this case for not using scrip, *on the precise day* is the payment in borrowed money, or in the proceeds of an execution sale, of an amount twice the value of the scrip to the bondholders. The penalty would be harsh and oppressive, if not ruinous to the company, and in the present case would be worth over double the value of the scrip to the bondholders. That a technical rule of law should be so applied as to work this in equity—as it was by the Circuit Court—is, we submit, unjust in the highest degree.

In this case, the contingency which the parties had agreed upon as a condition precedent to the right to issue scrip (*i. e.*, a failure of net earnings), presupposed

a low financial condition of the company; and hence the parties must have known beforehand that, if the right to issue scrip (having once accrued) should be forfeited, the company must borrow money or submit to a sale of its property on execution. Plaintiff's construction, adopted by the Circuit Court, of the option necessarily is that such was the harsh and oppressive result which the parties contemplated should attend a technical default on the part of the company.

WE SUBMIT, therefore, upon the foregoing authorities, that the following propositions are established:

1. An obligation for the payment of a sum certain, in the notes of a particular bank, in the bonds of a particular State, in railroad stock, in railroad scrip, or, in short, in any paper susceptible of numerical valuation, is not governed by the rule adopted by the Circuit Court in respect to contracts to pay a sum certain in *specific articles*.

2. Upon obligations so payable in paper, bearing a numerical expression, the measure of damages, in case of default, is the cash, and not the nominal value of the paper at the time when payment should have been made.

3. If such obligations may be discharged in any one of several kinds of mediums, differing in value, the medium of the lowest value in which the debt might have been discharged will be regarded by the Court in the measurement of damages, and will afford the basis upon which compensation will be decreed.

4. The rule invoked by the plaintiff, and adopted by the Circuit Court, has no application where there is a known inequality in the mediums of payment.

5. The proposition last stated holds good, irrespective of any *optional or alternative form* of contract which the parties may have adopted.

6. If the defendant is liable at all, on the agreed facts or the facts as found by the Circuit Court, such liability is not the par of the interest sued for, but the value of the scrip and interest on such value, and the judgment should be reversed and the case remanded with direction to enter the proper judgment.

JOHN F. DILLON,
W. S. PIERCE, JR.,
Of Counsel for Plaintiff in Error.

[17150]

Nov. 7, '87.—75.

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UNITED STATES SUPREME COURT.

OCTOBER TERM, 1887.

No. 97.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

HENRY S. MARLOR,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JOHN R. DOS PASSOS,
Of Counsel for Defendant in Error.

NEW YORK:
DOUGLAS TAYLOR, LAW PRINTER, 89 NASSAU ST., CORNER FULTON.
1887.

Supreme Court of the United States.

OCTOBER TERM, 1887.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

against

HENRY S. MARLOR,
Defendant in Error.

Brief for Defendant in Error.

The plaintiff in error devotes 77 pages of a printed brief to show not what the contract involved *is*, but what it *should have been*. The brief labors earnestly to prove what a bondholder's rights under an "*Income bond*" are, but it fails to recognise the vital fact that the present obligation is neither in its form nor language such a bond. An Income Bond contains no such language as that used in the bond in suit. It is altogether different, as everyone knows who has any familiarity with such instruments.

The bond in suit is designated at the top "Seven per cent. *Income* and Land Grant Bond on Eastern Division."

That is the title of the bond. If the word "*Income*" had not been used in the *title* the plaintiff in error would not have had anything to build his elaborate argument on. That word "*Income*" in the title of the instrument is the sole inspiration of his brief. His argument is based upon

a single word in the *title*, while the *language of the body* of the bond is carefully and absolutely ignored.

It has almost become a proverb in the New York financial world that a holder of railroad bonds has no rights which the company issuing them is bound to respect. The action of the company in this case strongly illustrates that condition of affairs. Although on the 1st day of July, 1882, and on the 1st day of July 1883, the holders of the bonds were entitled to receive their interest in cash or scrip, the company paid no more attention to their rights than if the bonds had not been created. In October, 1883, the bondholders mustered courage enough to demand the payment of their interest in cash, and although, according to the brief of the plaintiff in error now filed "The language of the bond leaves it entirely optional with the company (if there have been no net earnings) whether it will issue scrip or not" (Brief pp. 11 & 12), the company, at that remote period from the date when the interest matured, viz., on *October 12th*, 1883, hastily convened its board together (Record p. 54) and declared its purpose to pay the interest due *July 1st*, 1882, *and July 1st*, 1883, in *scrip* and thus endeavored to head off the demand of the bondholders for payment of the interest in cash. The plaintiff in error did not believe *then*, as it *now* argues, that it was "entirely optional" with the company whether it would issue scrip. Before the concentrated action of its bondholders, the company at that time recognised that the bond meant *something*. But lapse of time has taught it wisdom, and enables it now to argue that it means *nothing*—that the bondholder is not entitled to any interest at all, until the maturity of the principal, unless net earnings in each year are made sufficient to pay it! That the words in the bond, "with interest thereon at the rate of seven per cent. per annum *payable annually*, on the *first day of July* in *each* year," mean nothing—that this language of the bond becomes ineffectual and fades out of sight, before that word of deep and wonderful import "*Income*" as used in the *title* of the bond.

The sole question in the case is, what were the rights of the holders of these bonds on the first days of July, 1882 and 1883? They certainly were not entitled to demand payment in scrip, because the option was created for the benefit of the company and the bondholders could not force it to issue the scrip. If the bondholder was entitled to anything therefore, he was entitled to money, and that interest was to be paid in one form or another to him, no one can doubt who reads the language of the bond which has been drawn with especial care in respect to the payment of the annual interest.

POINTS.

First.—The bonds in suit are fixed and absolute promises to pay interest in money or scrip on July 1st of each year.

This proposition is clearly supported by the following analysis of the bond, and the mortgages securing the same. The Land Grant Mortgage is dated May 15, 1875, between the Company of the first part, and W. T. WALTERS and GEORGE D. KRUMBHAAR, trustees, to secure $8,908,000, 7 PER CENT. *currency* bonds, payable 1st of January, 1915.

The meeting of the stockholders authorizing this issue was held on the 29th of March, 1875.

And the resolution empowered the directors to issue 8,908 INCOME & LAND *grant bonds each for the sum of one thousand dollars* BEARING SEVEN PER CENT. INTEREST, THE INTEREST AND THE PRINCIPAL *of said bonds* TO BE PAYABLE IN UNITED STATES CURRENCY, and said bonds to mature in forty years from their date, AND TO SECURE THE PAYMENT OF THE IN-

TEREST AND THE PRINCIPAL *of said bonds by a first mortgage upon all the lands heretofore granted to this company.*" (The bonds are made payable *in lawful money.*) &c., &c. * * * * "*And said mortgage or deed of trust shall* ALSO *include the net income of the company from the operating of its lines east of Fort Worth, after* providing for the (1) operating expenses, the (2) current repairs and (3) reconstructions, and the (4) interest on the first and second mortgages hereinbefore provided for; *and there shall be included in said mortgage or deed of trust, a provision for a sinking fund out of the net proceeds of sales of land, and by the receiving of said bonds in payment for purchases of lands covered by the mortgage.* THE BONDS THUS PROVIDED FOR SHALL BE EXCHANGEABLE FOR OUTSTANDING LAND GRANT BONDS, AND USED IN PURCHASE OF MATERIAL AND SUPPLIES AND FOR CONSTRUCTION WORK, OR MAY BE APPLIED TOWARD THE PAYMENT OF ANY OF THE COMPANY'S INDEBTEDNESS OR OBLIGATIONS."

This resolution is evidence.

Boardman *vs.* Lake Shore & Michigan Southern R. R. Co., 84 N. Y., 157.

This resolution is inserted in full in the mortgage. It will be seen that it provided for the payment of the *interest in currency*, and the company did not through its stockholders reserve any option to pay the interest in scrip. *That clause was inserted without apparent authority* by the conveyancer by the directions of some one other than the stockholders.

An analysis of this bond is here made.

The bond is called at the top:

"*Seven per cent. Income and Land Grant Bond on Eastern Division.*"

"The Texas and Pacific Railway Company hereby acknowledges itself to be indebted to of or assigns, in the sum of one thousand dollars, lawful money of the U. S. of America, which sum the said company promises to pay to the said or assigns, at the office of the company in the City of New York, *on the first day of January, A. D.* 1915, one thousand nine hundred and fifteen, WITH INTEREST THEREON, *at the rate of seven per cent. per annum*, PAYABLE ANNUALLY ON THE FIRST DAY OF JULY IN EACH YEAR, *as provided in the mortgage hereinafter mentioned.*

Here is as clean and absolute a promise to pay interest as could possibly be made.

The words "*as provided in the mortgage hereinafter mentioned,*" *refer to all of the antecedent words of the clause in which it is found.*

"As provided in the mortgage hereinafter mentioned." What is provided in the mortgage? Why it is most explicitly provided therein *that* the interest and principal shall both be paid.

But assume that the words "as provided in the mortgage hereinafter mentioned," refer exclusively to the seven per cent. interest? What then? There is nothing in the language of the mortgage which affects, limits or restricts the absolute promise to pay interest. We turn to the mortgage and find this language, "in order to secure the pay ment of the principal and INTEREST of said 8,908 bonds, *according to the* TENOR thereof," hath granted, &c. And the stockholders' resolution is inserted in full in the mortgage providing for the payment of the interest in CURRENCY—the absolute obligation and promise to pay interest at all events.

Now, what are the provisoes in the mortgage deed as to the payment of *principal and interest.*

Here is the "*habendum*" *clause.* "Now this indenture witnesseth, that the said party hereto of the first part, for and in consideration of the premises * * * * *in order to secure* THE PAYMENT OF THE PRINCIPAL AND INTEREST of the said 8,908 BONDS, ACCORDING TO THE TENOR THEREOF, hath granted," &c., (1) all the lands acquired or to be acquired; *also* (2) all the net income of the road east of Fort Worth, being 524 miles, after deducting the things before specified; (3) together with all depots, rolling stock, &c., of the lines of railway; (4) "including also, all the net income arising from the leasehold interest of said Company in the line of railroad of the Vicksburg, Shreveport and Texas R.R. Co.," from Shreveport to a connection with the line of railroad of the Texas and Pacific.

We are thus enabled to see from this "habendum" clause why the words "as provided in the mortgage hereinafter mentioned" are used. They are to refer the bondholder to the mortgage, where he can see, by reading this habendum clause, and the other parts of the mortgage, just what security he has for his debt and interest.

We are, also, thus enabled to learn why the words "seven per cent. *Income* and Land Grant Bond on the Eastern Division" are used at the top of the bond to designate it. It is called an "Income" and "Land Grant" bond because it has as security for its payment not only the promise of the Company, but a mortgage on all the *lands* of the Company, and on all the net *income* of the road east of Fort Worth. It is not called an income bond, because as is erroneously argued by plaintiff in error, the *interest* is payable from the *income*, for there is nothing in the bond or mortgage to justify such a contention. An analysis of the bond shows:

1st. The absolute promise to pay principal and interest in the beginning of the bond to which I have already referred.

2d. Not only an absolute promise, but one to pay at certain time and place. "At the office of the company, in the City of New York, on the first day of January, A. D. 1915, with interest thereon at the rate of 7 per cent. per annum *payable annually on the first day of July* in each year, as provided in the mortgage hereinafter mentioned."

3d. The bond goes on then to recite: "This bond is one of a series of bonds, * * * *the payment whereof is secured by a first mortgage*" upon certain lands therein mentioned.

4th. The enumeration of lands having been given, the language of the bond continues: "This bond "has ALSO *as security for the interest* a mort- "gage lien upon the net income of the said "Texas and Pacific Railway Company, *derived* "*from operating its lines of railway east of Fort* "*Worth*, in the State of Texas, after providing for "the operating expenses, the current repairs and "reconstruction, and the interest upon the first "and second mortgage bonds, secured upon said "lines of railway, the length of which, constructed "and to be constructed is estimated to be 524 miles, "*and in case, such net earnings shall not*, IN ANY "ONE YEAR, *be sufficient to enable the company to* "*pay 7 per cent. interest on the outstanding bonds*, "THEN *scrip* MAY, AT THE OPTION OF THE COM- "PANY BE ISSUED *for the interest;* such scrip to be "received AT PAR AND INTEREST, *the same as* "*money* in payment for any of the company's lands, "acquired as aforesaid, in Texas, at the ordinary "schedule price, or it may be coverted into capital

"stock of the company, when presented in amounts "of $100 or its multiple." (This clause is not in the resolution of the stockholders authorizing the issue of the bonds.)

The question therefore arises as to the meaning of this part of the bond.

(*a.*) It must be borne in mind in the first place that by the bond in question the railroad company becomes in law, irrespective of the security of the mortgage, a debtor of each of the bondholders to the amount of $1,000 and interest.

Because there is an absolute promise to pay the principal and interest.

This proposition, if it be conceded, enables each bondholder to sue for his *interest* the very moment default be made.

Outside of the security of the mortgage he becomes in law a general creditor of the company—with all of the rights of a general creditor—immediately to collect his debt by a resort to a court of law.

The mortgage is only an additional security created for his benefit.

The bond is the principal; the mortgage the secondary security.

Examine in this connection.

Phila. & Sunbury R. R. Co. *vs.* Lewis, 33 Pa. St., 33.

Phila. & Balt'r Central R. R. Co. *vs.* Johnson, 54 Pa. St., 127.

State of Florida *vs.* Anderson, 91 U. S.,667 (cited in Jones on R. R. Securities, Sec, 398).

In the last named case the Court says, at p. 679:

"Of course, the company giving the bonds is "primarily liable to the bondholders for principal

"and interest as they become due, inasmuch as the "bonds import on their face an absolute promise to "pay; and on failure to pay, suit may be instituted "at once against the company. Back of this per- "sonal liability of the company the bondholder has "a double security: First, the guaranty of the in- "ternal improvement fund; and secondly, the statu- "tory lien on the railroad. He cannot avail himself "of the latter directly, as he could if it were a mort- "gage given to secure the bonds alone; but he must "induce the trustees to act in the mode pointed out "by the statute. If they refuse to act when they "ought to do so, the bondholders may either compel "them to act by *mandamus* or file a bill in equity to "obtain the relief to which he may be entitled."

(*b.*) If the proposition attempted to be enforced in the foregoing subdivision is correct, then we have this condition of affairs:

1st. The bondholder has the personal security of the debtor for the interest.

2d. He has the security of the lands granted by the State of Texas to this and other companies to which it has succeeded.

What else has he? We are now speaking of the question from the standpoint of the bond. Let us answer this in the next point.

(*c.*) This bond has ALSO as security for the INTEREST *a mortgage lien upon the net income derived from operating its lines of railroad east of Fort Worth,*" subject to certain deductions specified. * * * "*And in case such net earnings shall not in any one year be sufficient to enable the company to pay*

per cent. interest on the outstanding bonds, THEN scrip may, at the option of the company, *be issued for the interest, such scrip to be received at par* AND INTEREST THE SAME AS MONEY, in payment for any of the company's lands acquired as aforesaid, in Texas, at the ordinary schedule price, or it may be converted into capital stock of the company when presented in amounts of $100, or its multiple."

Here then arises a condition in the contract, viz., that in case the net earnings are not sufficient in any one year to enable the company to pay 7 per cent., THEN it may at its option issue scrip.

This is very simple: If the company does not earn net 7 per cent. out of this 524 miles of road, it may *at its option* pay off the interest in scrip.

Why was this option inserted? Plainly for the benefit of the company? In what way for the benefit of the company?

Obviously to prevent it from drawing this 7 per cent. interest from its GENERAL TREASURY. The bondholders agreed if the company wished to reserve its cash, *to accept scrip.* They gave the company the option to issue scrip—when there were no net earnings on this 524 miles of road—instead of paying the interest in cash.

Not having exercised this option, it became in law and morals bound to pay cash.

The idea that if the company did not make 7 per cent. net out of this branch of the road, it had the right to say that it would pay *no interest at all either in scrip or money* cannot be seriously entertained.

This will appear when the nature of this portion of the bond is fully understood.

1st. Suppose the company made only 4 or 5 or 6 per cent.? Could it put this in its treasury and

say to the bondholders "*You shall not receive interest either in money or scrip*" ?

How could it be permitted to take this position when *all* of the *net income* of this portion of the road had been specially pledged for the benefit of the bondholders ? The company had no right to deprive the bondholders of this net income merely because it did not reach 7 per cent. It only had the option if such net income did not amount to 7 per cent. to pay the interest in scrip—instead of using the resources of the general treasury.

2d. Another consideration which effectually disposes of the notion that unless the company earned 7 per cent. out of this branch of the road, it had the right arbitrarily to say it would pay no interest at all in any shape—is this: Here was not a mortgage on the 524 miles of railroad east of Fort Worth *alone*. In truth it was only a third mortgage on this branch of the railroad.

But it was and is primarily a mortgage on the *lands* of the company, *which were primarily pledged for the payment of the principal and interest.*

And it was only as an additional security—as an additional inducement—that the bondholders had ALSO *as security* a mortgage lien upon the net income of road east of Fort Worth.

(*d.*) We then proceed to consider the remaining portion of this clause of the bond which also throws some light upon the question, viz., as to what disposition could be made with the scrip when issued ?

"Such scrip to be received *at par* AND *INTEREST*, THE SAME AS MONEY, in payment (1) for any of the company's lands, acquired as aforesaid,

in Texas, at the ordinary schedule price, or (2) it may be converted into capital stock of the company, when presented in amounts of $100, or its multiple."

This clearly shows an intention on the part of the company, to make the scrip the same as a money payment of the interest.

One by taking this scrip did not lose anything, because the scrip itself carried *interest*, and no matter how long it was outstanding the holder of it would always be compensated by receiving an additional quantity of land or stock, as the case might be, to represent the scrip.

(*e.*) Skipping a sentence, we come to the final clause of the bond, viz.: "This bond *also* will be received by the company at par and ACCRUED INTEREST in payment, or exchange for any of its lands covered by the mortgage aforesaid, at the current cash price of the same, as fixed from time to time."

Here again occurs an express determination of the company to absolutely pay *interest at all events*. The company here agree to take these bonds in payment of lands, not the principal of them, but the principal and *accrued interest*—one month's accrued interest—two months' accrued interest, or five months' accrued interest, as the case might be. Thus showing a clear intention to pay interest without regard as to whether the *net* income of the road east of Fort Worth earned interest or not.

(*f.*) An analysis of the language of the bond, therefore, shows an agreement to pay interest absolutely, and at all events without any contingency, and without any condition, except that in case it did not derive a sufficient net income from the operation of the road east of Fort Worth—*then* and then only it had the right to substitute *scrip* for money, but

in no event to deny the bondholder his interest in either of these forms.

(*g.*) Finally, there is a certificate of the trustees attached to each bond:

"This bond is one of a series of bonds, each for the sum of one thousand dollars, lawful money of the United States of America, *bearing seven per cent. interest per annum*, PAYABLE YEARLY. * * Said bonds are secured by first mortgage upon all lands of Texas & Pacific Rlwy. * * east of Ft. Worth, and also upon the net income of said lines of railway, after deducting current expenses, reconstruction and repairs, and the interest upon the first and second mortgages on said lines of railway. And they are also receivable, *the same as money*, in payment or exchange for such lands at the current price of the same as fixed from time to time."

This gives a practical construction to the language used in the body of the bond; and fully sustains the views above expressed, that the bonds in suit are absolute promises to pay interest in money or in scrip.

This construction was fully sustained by Mr. Justice Wallace in the trial of the cause in the Court below. (Rec. p. 59).

Second.—An analysis of the mortgage shows that it contains nothing which limits in any way the absolute promise contained in the mortgage to pay the interest annually.

It provides that said company, "*in order to secure the payment of the principal and* INTEREST *of said* 8,908 bonds, ACCORDING TO THE TENOR *thereof*," hath granted, &c.—

Third.—The plaintiff is entitled to recover the interest in cash.

The bond in question makes the interest payable annually and at all events, but it gives the defendant the benefit of an option, viz.: that if the earnings of the road east of Fort Worth are insufficient to pay such interest, then the defendant may, if it so chooses, pay the same in scrip.

This option being created for the benefit of the defendant, it had the right to exercise and enjoy it at the time the interest became due, but if it did not exercise it at such time, then it lost it, the right has gone, and it became liable to pay the interest in cash.

I.—*Elementary writers, Wharton*, Law of Contracts, Sec. 619 (1882).

"When a note is in the alternative, as when it is "payable in money or furniture or other specific arti- "cles, the debtor has an election to pay in money or "such specific articles; *and after the day of payment "has elapsed without payment the creditor has the "right to demand payment in money.*"

"Sec. 620: "And as a general rule in case an elec- "tion be given of two several things always he that is "the first agent and which ought to do the first act "shall have the election."

Sec. 622: "*The election is limited by its own terms. When the party having the option is bound by the 'contract to exercise it within a certain period, if he "let that period elapse without exercising the option, "the right is forfeited.*"

Sec. 624: "When a note is payable, at any time be- "fore maturity, in specific articles, the election so to "pay is terminated by maturity. After that period "the payee's right to demand money is absolute."

Story on Contracts, Sec. 1323 (5th Ed.).

"When by the terms of the contract it is in the "option of the promisor which of two acts he will "perform, as if he agree to do a certain act at a certain "time or to pay a sum of money, or deliver a horse the "promisor has the right to elect which he will do. "*For*, if an election be given to do two things, he who "is the first agent and who ought to do the first act, "is entitled to the election. *But if the contract be to "do one of two things by a certain day he has the "right to elect which he will do until the day is "passed and not afterwards.* So also when one alter-"native is illegal the promisor is bound to perform the "other."

Chitty on Contracts, p. 660 (11th Ed.)

"When a contract is in the alternative, as that the "promisor shall pay a sum of money or deliver a horse "to the promisee, the right to elect the mode of per-"formance is impliedly vested in the promisor, the rule "being that in case an election be given of two sev-"eral things, always he that is the first agent and "which ought to do the first act shall have election." (This rule, which the text writers all quote, is from Co. Litt. 145a.)

"And if one branch of the alternative cannot be per-"formed the promisor is bound to perform the other. "*But if the promisor once makes his election he is "absolutely bound thereby.*"

Addison on Contracts, 1187, 1188.

"Under an agreement to perform one of two things, "the right of election is in the party who is to do either "one or the other of the two things. If a man "granteth a rent of 20s. or a robe to one of his heirs, "the grantor shall have the election; for he is the first "agent by payment of the one and delivery of the "other.

"*If a purchaser, on the delivery of goods, has a* "*right to elect whether he will pay by bill or cash, and* "*fails to give the bill, he will be deemed to have made* "*his election to pay cash and cannot afterwards re-* "*voke it.*"

2 *Parson* on Contracts, 651.

"If the promise be to pay money at a certain time or deliver certain chattels, it is a promise in the alternative, and the alternative belongs to the promisor. He may do either the one or the other at his election; nor need he make his election until the time when the promise is to be performed, *but after that day has passed without election on his part, the promisee has an absolute right to the money and may bring his action for it.*"

The doctrine of the *Civil Law* is substantially the same.

In Pothier on Obligations it is said (p. 2, C. 3, Art. VI.): "Where two or more things are promised in the "alternative, though they are all due, there is but "one obligation which may be discharged by the pay- "ment of any one of them, *alterius solutio totam obli-* "*gationem intermit.*"

The choice belongs to the debtor, unless it is "ex- "pressly agreed that it shall belong to the creditor.

"But though the debtor may elect to pay which he "pleases, he cannot pay part of the one and part of the "other. Therefore, if the obligation is to pay ten "pounds or six measures of corn, he cannot give five "pounds and six measures of corn."

"When several things are due in the alternative the "extinction of one does not extinguish the obligation."

"When one of two things due under an alternative "obligation happens to perish the debtor will not be "allowed to offer the price of that in order to avoid the "payment of the other, for what is lost thereby ceases

"to be due, and consequently the only thing which "can be paid."

Also *French Code Civil*, Book 3, Lit. 3, Art. 1190.

II.—*English Precedents.* The English precedents are quite uniform in support of the general rule from the earliest date.

The case of 13 Edwd. IV., pl. 12, and which is abridged in Bro. (Dette pl. 159), established this rule: That was debt upon an obligation to pay £20 or 20 bales of wool, and the plaintiff demanded the £20. Pigot and Brian, J., held that before the day of payment the obligor had his election to tender which of them he would, but that after the day of payment, and no tender made, the obligee had his election to demand which he would. (See other English cases cited in McNitt *vs.* Clark, 7 Johns., 465.)

If the promisor once makes his election he is absolutely bound thereby. Thus in Brown *vs.* Royal Insurance Co., 1 El. & Bl. 853, the Insurance Co. reserved the right of reinstatement in preference to the payment of claims. It elected to reinstate and then it became impossible to do so because the Commissioner of Sewers caused the premises to be taken down. *Held*, that the plea of impossibility was bad, and that the company must pay damages for not reinstating.

See also—

Layton *vs.* Pearce, Doug., 15.
Reed *vs.* Kilburn Coop. L. R., 10 Q. B., 234.
Chippendale *vs.* Thurston, 4 Car. & P., 98.
Stevens *vs.* Webb, 7 Car. & P., 60.

III.—*American Precedents.*

McNitt *vs.* Clark, 7 Johns., 465 (1811).

When, by condition of his bond, the obligor had an election to pay $600 for a patent right at the end of twelve months, or $400 in six months, or to account to the obligee for the profits, and the obligor sold the right to a third person and made no election within the twelve months, it was held that the obligor having failed to make his election within the time specified, he had lost his election, and the obligee could hold the obligor for the payment of the $600. (See declaration in this case.)

In Stephens *vs.* Howe, 2 J. & Sp. 133 (1873), Monell, *J.*, said: "The contract in this case was in the alter-"native to pay five and a half cents in gold coin, or "nine cents in currency. The defendants had the "option at any time before default to pay in either "kind of money. The rule is that if a party is bound "to make an election by performing one or other alter-"native by a certain time, and suffers the day to pass "without performing either, he loses his election and "the other party may elect for himself." In this case it was held that the debtor had lost the right of election and that the creditor, therefore, had the right to elect and that in fact he had elected to take payment in gold coin and must recover on that basis.

Stewart *vs.* Donnelly, 4 Yerg, 177 (1833).

There the defendants made their note for $8,000, payable 1st November, with a condition that it might be discharged in salt delivered at Nashville at $1.12 per bushel. It was not delivered at the time stipulated, *the low water preventing it*, and the Court *held that the money was due and that plaintiff was not bound to receive the salt after the day specified.*

Lawrence *vs.* Dougherty, 5 Yerg., 435.

Note for $—— "may be discharged in cotton"—cotton not delivered at time stipulated—it becomes a

money demand and debt in the *debet* and *detinet* will lie against maker.

The same effect is: Miller *vs.* McClain, 10 Yerg, 245.

In Choice *vs.* Moseley (1 Bailey, 136), the defendant, who had promised to pay on or before a certain day a certain sum to be discharged in a horse, tendered the latter the day after the appointed time, which the creditor refused, and the Court decided the defendant must pay in cash.

* * "If he suffer the day to elapse without performing either, his contract is broken, and his right of election lost. * * The payee of the note might reasonably calculate upon the value of a horse at a particular day. He might want him at that time for a particular purpose. *But if it were left to the defendant, at his election,* to deliver a horse at any indefinite period afterwards, he might select that time at which the *value of the horses would be most depreciated and thus gain an advantage inconsistent with his contract.*"

Butcher, *vs.* Carlisle, 12 Gratt. Va., 520 (1855).

A bond for the payment of money which sum may be discharged in notes or bonds due on good solvent men residing in the County of A.

Held, that this was a bond for the payment of money for which debt would lie, and that it was not necessary to notice the provision as to the mode of payment in the declaration. Moncure, *J.*, said: "The obligor "having failed to pay the money in notes or bonds on "or before the day fixed for payment, and thus become "liable absolutely for the payment of the money, an "action of debt was maintainable against him for it; "and it was unnecessary for the declaration to charge "the nonpayment of the debt in notes or bonds."

Same effect is:

Crawford *vs.* Daigh, 2 Va. Cas., 521.

Plowman *vs.* Riddle, 7 Ala., 775 (1845).

Promise to pay $300 at a certain day which may be discharged in good leather at a specified price; leather not delivered nor offer to deliver, nor notice of readiness to deliver on or before maturity of the promise.

Held, by the failure of defendant to give notice of his intention to pay in leather the contract, which was before conditional or alternative, became absolute.

The plaintiff declared on the promissory note for $300, and his action was maintained.

ORMOND, *J.*, said: "The defendant appears to have "considered this contract, as in legal effect, a promise "to deliver leather to the value of $300 at a particular "time, but that is clearly not the contract of the par- "ties which is to pay $300, with a condition super- "added giving him the privilege of discharging it in "leather at a specified price. This is clearly for their "benefit, and it was their duty, if they elected to de- "liver the leather in discharge of their contract, to "give notice to the plaintiff of their readiness and "willingness to do so. Having omitted to do so, their "contract to pay the money has become absolute, and "they cannot when sued for the money defeat the "action by proving the existence of a fact which was "peculiarly within their own knowledge.

"*The injustice of this defense* (*that is, that they "were ready to pay in leather*) *will be apparent when "it is considered that the defendants were under no "obligation to deliver the leather, and if it had risen "in price doubtless would not have delivered it, but "would have paid the money; being then a condition "invested for their benefit, it was necessary that they "should have given notice of their election to pay in "leather.*"

Mettler *vs.* Moore, 1 Black (Ind.), 342 (1825).

Obligation for $125, payable in whiskey; failure to deliver whiskey when obligation due.

BLACKFORD, *J.*, said: "Whether the plaintiff could "not, under certain circumstances, have had damages "assessed by a jury to a greater amount is not now the "subject of inquiry. *One thing is very certain, he "was entitled from the face of the obligation to the "amount at least of the principal and interest for "which he took judgment.*"

McRae *vs.* Raser, 9 Porter (Ala.), 122 (1839).

Plaintiff declared on a promissory note, and described it as one by which defendant "promised to pay on or before the first day of January next after the date thereof to plaintiff the sum of $280 for value received"

Plaintiff offered in evidence a note which, in addition to the above, contained this claim—"that this "obligation for $280 may be paid by any other paper due the first day of January next which I may think fit to indorse." Defendant objected to the admission of this note in evidence on the ground of variance, but was overruled.

COLLIER, *C. J.*, said: "So much of the note as "sets forth an understanding between the par-"ties that it might be discharged by defendant "by the endorsement of other paper due at the same "time must be regarded as a stipulation for his "benefit. He might avail himself of it or not at "his election, but it cannot influence the plaintiff's "right to recover the amount of the note and interest, "unless it has been discharged by the substitution of "other paper according to the terms of the contract, "and this, if it was done, should have been shown at "the trial."

"All agreements to pay in specific articles are presumed to be made in favor of the debtor, and he may in all cases pay the amount of the debt in money in lieu of the articles which, by the terms of the contract, the creditor had agreed to receive, instead of money."

This was adopted as the correct rule by Thurman, *C. J.*, in Trowbridge *vs.* Holcomb, 4 Ohio St., 38. Same rule in Perry *vs.* Smith, 22 Vt., 301. In Church *vs.* Feterowe, 2 Penrose and W., 301 (1830), the note was for payment of a certain sum of money at a certain time, to be paid in furniture.

Held that until day of payment the payor has an election to pay either in money or in furniture, but after the day *of payment is passed his right of election is gone and the payee's right to demand the money is absolute.*

Smith *vs.* Smith, 2 Johns., 235.

Note for value received, payable in land—default.

Held, that an action on the money counts was maintainable and note evidence of consideration.

Also Crandall *vs.* Bradley, 7 Wend., 311.

Laxton *vs.* Johnson, 10 Johns., 418.

IV.—*Summary of Law.*

The result of the cases and of the authorities may be summed up as follows:

First.—The general rule, as laid down by Coke (Co. Litt., 145) is this: In case an election be given of two several things, always he who is the first agent, and which ought to do the first act, shall have the election.

This was the rule adopted by Lord Mansfield in Layton *vs.* Pearce, Doug., 15, and by Blackburn, *J.*, in Reed *vs.* Kilburn Co. Op. Soc'y, L. R., 10 Q. B., 264.

See also Chippendale *vs.* Thurston, 4 Carr. & P., 98.

Second.—Where a note, bond or obligation is to pay a sum of money or some other article, chattel or other specified property, in the alternative on or before a certain day, the obligor, has the right of election to deliver the article, &c., on or before the day named.

If he fails so to deliver, on or before the specified day, *he has lost* his election, and he is liable absolutely for the money.

McNitt. *vs.* Clark, 7 Johns., 465.
Stephens *vs.* Howe, 2 J. & Sp., 133.
Walton *vs.* Coulson, 1 McLean, 120.
Aff'd 9 Pet., 62.
Dinsmore *vs.* Duncan, 57 N. Y., 580.

Third.—There *is* a large class of cases in which the obligor agrees to pay a certain sum of money, at a specified time, by delivering certain specific property.

These obligations are treated as alternative contracts, and if the obligor fails to deliver the specified property on or before the day of payment, the obligation becomes absolute, and the obligee or creditor is entitled to the money.

Pinney *vs.* Gleason, 5 Wend., 393.
Fletcher *vs.* Derrickson, 3 Bosw., 181.
Blackner *vs.* Holmes, 13 W. Dig., 424.
Gilbert *vs.* Dansforth, 6 N. Y., 585.
Baker *vs.* Mair, 12 Mass., 120.
Mettler *vs.* Moore, 1 Black. (Ind.), 342.
Russell *vs.* McCormick, 45 Ala., 587.
McRae *vs.* Raser, 9 Porter (Ind.), 122.
Stewart *vs.* Donnelly, 4 Yerg., 435.
Miller *vs.* McClain, 101 Yerg., 245.
Church *vs.* Feterow, 2 Penrose & W., 301.
Perry *vs.* Smith, 22 Vt., 301.
Wainwright *vs.* Straw, 15 Vt., 215.

Choice *vs.* Moseley, 1 Bailey, S. Ca., 196.
Vanhoover *vs.* Logan, 3 Scam., Ill., 389.

These cases go further than to fix the measure of damage, they interpret the obligation of the contract.

Fourth.—No demand on the part of the plaintiff was necessary to entitle him to the payment of the interest in money; and to limit the option of the defendant company to pay in scrip.

(*a.*) The plaintiff in error undertakes to support his proposition that a demand is necessary by a class of cases which we conceive have an entirely different purport. They are cases which fix the *measure of damage* where the obligation is payable in some particular security as bank stock, notes, Confederate currency or bonds or other stock or scrip.

They are not alternative contracts at all, but obligations to pay in a medium other than money, and on breach of the contract, the measure of damage is not the face value in money, but only its actual value in specie or the currency of the country.

This is all these cases decide and they are not applicable to alternative contracts like the present and do not touch the question of demand.

Of this nature are the following cases, cited by the defendant on his brief in this Court.

Moore *vs.* Hudson River R. R. Co., 12 Barb., 156.
Noonan *vs.* Ilsley, 17 Wis., 314.
Anderson *vs.* Ewing, 3 Litt., 245.
Gordon *vs.* Parker, 2 Smedes and M., 485.
Sedgwick on Damages, vol. 1, p. 511.

Phelps *vs.* Riley, 3 Conn., 266.
Eason *vs.* Abernathy.
Dillard *vs.* Evans, 4 Pike (Ark.), 175.
Williams *vs.* Sims, 22 Ala., 512.
Wilson *vs.* Jones, 8 Ala., 536.
Marris Adm'r Prather, 3 Ky., 196.
Sirlott *vs.* Tandy, 3 Dana, 142.
Williams *vs.* Jones, 12 Ind., 561.
Pierce *vs.* Spader, 13 Ind., 458.
Powe's Adm'rs *vs.* Powe, 42 Ala., 113.
Dook *vs.* Exs. of Snapp, 1 Coldw., 180.
Van Vleet *vs.* Adair, 1 Blackf., 346.
Parke *vs.* Marshall, 10 Ind., 20.
Porter *vs.* Buckfield Branch R. R., 32 Maine, 539.
Alexander & Tysen *vs.* Macauley's Admr., 6 Md., 360.
Orange, &c., R. R. Co. *vs.* Placide, 17 Gratt., 366.
Rives *vs.* Duke, 105 U.S., 132.
Thorington *vs.* Smith, 8 Wall., 1.
The Confederate Note Case, 19 Wall., 548.
Wilmington and W. R. R. Co. *vs.* King, 91 U. S., 3.
Robinson *vs.* Nobles Adams, 8 Pet., 181.

If the case now before the Court were an absolute promise to pay in scrip, then the cases we are now criticising would have some application; but as the latter are cases simply of the measure of damage, they have no application and the Courts rightly held that the plaintiffs were entitled for breach of the contract to damages only equal to the actual value of the stock.

The defendant in error in this case does not desire the scrip of the defendant company; and if he had wanted it on the first of July in the years 1882 and

1883, when the interest on his bonds became due, he could not have got it. *He had no right to demand it under the terms of the bonds, he was only entitled to money. It was the right of the company to pay in scrip; not the plaintiff's right to demand it.*

It is the contention of the defendant that we should have demanded the money, which under the terms of the contract became due July 1st, 1882 and 1883, on those days in order to limit the exercise of the option to the days named.

The record shows that the company took no steps to issue scrip until long after the interest was due by the terms of the bonds, and could not pay scrip on July 1st, 1882 and 1883 (see Record, p. 55). Consequently, a demand for the said scrip would have been wholly nugatory and the law will not require a party to perform a nugatory act.

Judge Wallace on the trial of this case below fully upheld our view of the question. He says in his opinion (Record, p. 60):

"It is insisted for the defendant that the defendant is not in fault until a demand by the plaintiff, and no valid demand having been made the plaintiff should fail in his action. Neither presentment or demand is a prerequisite to a right of action for a recovery of the interest, neither is necessary when there is a promise to make payment at a specified time, it devolves upon the debtor to prove payment or readiness to pay. There is no distinction in this respect between notes and negotiable bonds (Savannah and Memphis RR. Co. *vs.* Lancaster 62 Ala., 55; Phila. & Balt. RR. Co. *vs.* Johnson, 54 Penn. St., 127), and the rule applies also to notes payable in specific articles: Elkins *vs.*

"Barkhurst, 17 Ver't, 105; Wiley *vs.* Shoemaker, "2 Green, Ia., 205."

The obligation in this case is not shifting or ambulatory, it is fixed and absolute. It does not depend upon the acts of the obligees for vitality—it is not dormant until brought to life by the parties holding the bonds.

If this were so the obligation of the company would be as shifting and varied as the number of bondholders it had.

Some would demand one day and some another; if it had five hundred bondholders it would be subject to five hundred possible different obligations and constructions.

(*b.*) The facts in this case show a sufficient demand for the payment of the interest in cash before scrip was issued or tendered (see Agreed Statements of Facts, Record, p. 53 and 54). The attorney for the defendant in error called upon the attorney for the plaintiff in error to whom this matter was referred by the company, and demanded payment in cash before the company undertook to issue scrip (see 5th Finding of Fact, Record p. 63).

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